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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONTINENTAL CAN COMPANY,
Petitioner,

v.

ROBERT GAVALIK, *et al.*,
Respondents,

-and-

CONTINENTAL CAN COMPANY,
a member of The Continental Group, Inc.,
Petitioner,

v.

ALBERT JAKUB, *et al.*,
on behalf of themselves and others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. In enacting section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1140, did Congress intend to prevent an employer from enforcing a provision in a collective bargaining agreement to arbitrate any pension-related differences?

2. When ERISA, 29 U.S.C. §§ 1001 *et seq.*, both preempts state regulation of pensions, 29 U.S.C. § 1144, and sets no statute of limitations for section 510 claims, 29 U.S.C. § 1140, should the Court:

   a) set a uniform federal period of limitations as in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), or

   b) select a uniform federal characterization for the most analogous state period of limitations as in *Wilson v. Garcia*, 471 U.S. 271 (1985), or

   c) apply Pennsylvania State law?

3. In a mixed-motive discrimination case:

   a) Does the Third Circuit's "a determinative factor" test for causation conflict with this Court's "same decision" test in *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977)?

   b) Can a defendant employer be denied its entitlement to defeat liability in the class phase of a discrimination case by proving that the same decisions would have been made as to all members of the plaintiff class absent the proscribed factor?

c) When the plaintiffs at trial limited their claim to layoffs and the district court found that the same employment actions would have occurred in any event due to permissible reasons, did a Third Circuit Panel err when it found that pension avoidance was "a determinative factor", held that a "plan" constituted a *per se* violation of section 510 of ERISA, 29 U.S.C. § 1140, and found that recalls were included within the suit?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court.

Robert Gavalik, Frank Grelo, Joseph Urban, Anthony Ulyan, Donald A. Berger, Ronald Clarke, Henry Foster, George Patterson, Joseph Kellerman, Robert Pavlik, Phillip Farley, Thomas Riley, Thomas Warren, Francis Humenik, Albert J. Jakub, Fred Cipriana, Jr., Anthony J. Bernardo, Thomas A. Mulligan, William T. Tarr, Donald W. Roberts, Ernest Wirbecki, George W. Stepanic, Alfred Borrelli, Jr., Michael Di Iorio, Anthony Folino, Thomas E. Johston, Robert Kapolka, John C. Kincel, Peter A. Rumain, Harry H. Smith, Melvin J. Smith, Jack A. Stull and Ernest B. Taddeo

Continental Can Company, U.S.A., a member of The Continental Group, Inc.[1]

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[1] The Continental Group, Inc. has been merged into Kiewit Continental Inc. whose parent companies are: Kiewit Holdings Group, Inc., Kiewit U.S. Co., Peter Kiewit Sons' Inc. Subsidiaries (except wholly-owned subsidiaries) and affiliates of KMI Continental are: Altradec AG; Anlage und Handlesgesellschaft mbH; B.V. Handels-Maatschappij v/h Kortman; B.V. Leeuwenbrug; B.V. Metallwarenfabriek Drenthina; B.V. de Vereenigde Blik Fabrieken; bebo Plastik Verwaltungsgesellschaft mbH; bebo-Plastik GmbH & Co. KG; Beleggings-Maatschappij Zaandijk B.V.; Brasflor Commercio E Industria de Subprodutos de Maderia, S.A.; Braskraft S.A. Florestal E Industrial; CCL Industries, Inc.; CWC Leasing, Inc.; Cobelplast (U.K.) Ltd.; N.V. Cobelplast S.A.; N.V. Cobelplast Trading, S.A.; Continental Can Canada, Inc.; Continental Can Company of Europe B.V.; Continental Can European Industries, N.V.; Continental Can Hong Kong, Limited; Continental Can Leasing Company, Inc.; Continental Can Nigeria, Limited; Continental Can Saudi Arabia, Ltd.; Convertidora

(footnote continued)

Venezolana de Papel, S.A.; De Clerck N.V.; Desmacon Holding B.V.; Dominguez & Cia. Caracas S.A.; Dominguez Continental, S.A.; Doosan Continental Can Manufacturing Co., Ltd.; N.V. Schuybroek; Elbatainer France; Elbatainer (U.K.) Ltd.; Elbatainer Kunststoff und Verpackungsgesellschaft GmbH; Europemballage B.V.; Europemballage GmbH; Extruplast AG; Fabrica Boliviana de Envases, S.A.; Industrias Del Norte, S.A.; Jeddah Beverage Can Making Co., Ltd.; La Societe Francaise de Developpement de la Boite-Boissons-SOFRED S.A.; Lubeca Maschinen und Anlagen GmbH; MPB Foliengesellschaft mbH; Maatschappij tot. vervaardiging Van "DUCATT" Verwarmings En Kookapparaten B.V.; Machinenverwertungesellschaft mbH; Metaalwarenfabriek Pielkenrood B.V.; Metalurgica Matarazzo, S.A.; P.T. United Can Company Limited; Qualiplus USA, Inc.; RFG Recycling-Fordergesellschaft fur Getrankedosen mbH; SIA Handelsgesellschaft mbH; SLW-Versicherungsdienst GmbH; Schmalbach-Lubeca AG; Schmalbach-Lubeca Austria GmbH; Shellmar Comercio E Participacoes Ltda.; Schellmar Embalagem Moderna, S.A.; N.V. Sobemi; Tedeco B.V.; Tedeco GmbH; Tedeco S.a.r.l.; Tedeco U.K.; The Continental Group (Germany) GmbH; The Vinoxen Company, Inc.; Thomassen & Drijver Verblifa N.V.; Unicon Producing Company; Unterstutzungseinrichtung Schmalbach Lubeca-Werke GmbH; Verblifa N.V.; Weduwe J. Bekkers B.V.; YRSU B.V. Excluded from this list are corporations in which Kiewit Continental Inc. or its subsidiaries or affiliates have less than 10% ownership.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Continental Can Company, U.S.A., a member of the Continental Group, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 15, 1987, and corrected on February 19, 1987.

OPINIONS BELOW

The corrected opinion of the Court of Appeals is reported in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987); the finding of facts, conclusions of law, and the judgment order of the district court dated September 24, 1985, were unpublished. Both opinions appear in petitioner's appendix.

JURISDICTION

This Court has jurisdiction to review the judgment of the court below by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on January 15, 1987, and corrected on February 19, 1987. Petitioner filed a petition for rehearing with a suggestion for rehearing *en banc*. That petition was denied on February 19, 1987. This petition is being filed within 90 days of the denial of the petition for rehearing.

APPLICABLE STATUTES

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"); in particular § 510 of ERISA, 29 U.S.C. § 1140. The text of 29 U.S.C. §§

1113, 1132, 1133, 1140, and 1144 are included in the appendix along with the text of selected portions of the legislative history.

STATEMENT OF THE CASE

This petition arises from the Third Circuit reversal of a district court decision. The plaintiffs, former employees of defendant's can manufacturing plant in Pennsylvania, alleged that Continental had violated section 510 of ERISA by laying them off before they attained eligibility for so-called Rule of 65 or 70/75 pension benefits.[1] The basis for jurisdiction was section 502 of ERISA, 29 U.S.C. § 1132. The district court held in favor of the defendant and present petitioner, Continental Can Company, U.S.A. ("Continental").

Continental is a corporation engaged throughout the United States in the business, *inter alia*, of manufacturing cans. The certified union representative of the respondents is the United Steelworkers of America, AFL-CIO, Local 4337 (hereinafter referred to as "USW").

Beginning in the early 1970's, the can producing industry as a whole experienced a steady decline in business due principally to competition from new technology in aluminum cans, plastic and paper products, and self-manufacturing in the beverage industry.

As part of the company's management of its business in 1976, Continental developed and began to use a computerized data base, Bell I, that contained employee personnel information, including seniority date, job classification, and age. The company used a computer program called Bell II to measure the labor costs of its operations.

Continental laid employees off at its plant site in West Mifflin, Pennsylvania, in 1977 and 1978, shut down op-

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[1] The pensions at issue were provided by Continental in addition to regular retirement pensions for former employees in layoff situations. *See Gavalik* at 5-7 (App. at 8a-10a) for a further explanation of these layoff pension benefits.

eration of the "pail line" in the plant in 1978, and closed the plant in 1981. After being laid off, four of the named plaintiffs filed grievances, but the grievances were not appealed to arbitration.

Laid off employees filed two separate actions in the district court: *Gavalik v. Continental Can Co.*, No. 81-1519 (W.D. Penn. Sept. 8, 1981); and *Jakub v. Continental Can Co.*, No. 82-1995 (W.D. Penn. Sept. 27, 1982). The principal relief sought in these cases was the same as that sought in the above-referenced grievances. The cases were consolidated and a single class action was certified on January 17, 1984.

As one of its affirmative defenses, Continental asserted that as the complaint alleged discriminatory layoffs beginning in 1976, and continuing until the relocation of the pail line in the winter of 1977-78, the plaintiffs' complaint, first brought in September of 1981, was time-barred. As another affirmative defense, Continental asserted that the court lacked jurisdiction because the plaintiffs had failed to exhaust their administrative remedies.

After a non-jury trial, the district court held that employees did not need to exhaust the grievance or arbitration procedures (Conclusion of Law # 3; App. at 91a) and entered judgment for Continental finding that Continental had legitimate business reasons for the layoffs and the plant closings. (Findings of Fact 107 and 142; App. at 86a, 90a). The district court also held in its interlocutory opinion of December 15, 1983, that plaintiffs' claims were subject to Pennsylvania's six-year residuary statute of limitations ("SOL").

The employees appealed. Continental cross-appealed, renewing its claims that the employees' suit was barred by the applicable SOL and/or the employees' failure to exhaust their grievance-arbitration remedies.

A two-judge panel of the Third Circuit denied the cross-appeal and reversed the district court stating that the

burdens of proof had been misallocated; affirmed the district court's finding that a six-year SOL governed; and affirmed the trial court's conclusions that arbitration was not needed. *Gavalik v. Continental Can Company*, Nos. 85-3597 and 85-3615 (3d Cir. February 19, 1987).

The circuit did not remand the case to the trial court for further proceedings consistent with the changed burdens of proof. Rather, the Third Circuit held for the plaintiffs despite the district court's express findings that the closing of the pail line and the layoffs would have occurred in any event. *Gavalik v. Continental Can Co.*, Nos. 81-1519 and 82-1995 (W.D. Pa., September 24, 1985), Slip. Op. (Findings of Fact 107 and 142; App. at 86a, 90a). Under the remand order,[2] each individual plaintiff carries a presumption of liability in his favor. Continental can only limit damages by proving that the employees would have been laid off absent the proscribed motive.

REASONS FOR GRANTING THE WRIT

The petition asks this Court to address issues that affect literally millions of workers and thousands of employers in the United States.

First, the circuit courts have divided on whether employers can enforce collective bargaining agreement ("CBA") provisions to arbitrate pension disputes when violations of ERISA are alleged. Employers with multiple plant locations can thus face different treatment of identical employee claims based solely upon each plant's geographical location even when all employees are represented under the same CBA—exactly the situation the petitioner has faced.

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[2] By order dated March 20, 1987, the Third Circuit recalled the mandate of remand for 30 days and, once the petition is docketed, until disposition of the case before this Court.

Moreover, despite the federal labor policy favoring *prompt* resolution of disputes, the Third Circuit has adopted a SOL that can result in employers, such as the petitioner in this case, facing claims for damages many years after the events in question and many years after the grievance procedure was abandoned or completed and not appealed by individual workers. Such results can only have a chilling effect on U.S. companies considering whether to provide, continue or expand pension benefits.

Finally, the petition presents the important question of whether an employer can be denied the right, in the liability phase of a mixed-motive discrimination case, to prove through the preponderance of the evidence that the challenged decisions would have occurred absent the proscribed motive. The Third Circuit's denial of such a right to the petitioner not only conflicts with Supreme Court precedent and the precedent of other circuits, but also raises the spectre, if not reversed, of the Third Circuit denying basic due process rights to defendants in the full range of discrimination cases filed in the federal district courts of that circuit. For example, during 1985, 549 civil rights employment cases alone were filed in the U.S. district courts in the Third Circuit. Am. Jur. 2d Desk Book, Item No. 66 (July 1986 Supplement). Exercise of the Supreme Court's supervisory function to assure conformance of the circuits to teachings of this Court and the basic tenets of the Constitution are particularly appropriate in such a situation.

I. THE THIRD CIRCUIT'S DETERMINATION ON THE ARBITRABILITY OF ERISA-BASED CLAIMS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND THIS COURT.

The Third Circuit's *Gavalik* decision that statutory claims under ERISA are not arbitrable is in direct conflict with the decisions of the Seventh Circuit Court of Appeals in *Dale v. Chicago Tribune Co.*, 797 F.2d. 458, 466-67 (7th

Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987) and *Kross v. Western Electric Co., Inc.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983), with the decision of the 11th Circuit in *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1222-1225 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986), and with the decision of the 2nd Circuit in *Alfarone v. Bernie Wolff Construction*, 788 F.2d 76, 79 (2d Cir.), *cert. denied*, 107 S. Ct. 316 (1986). However, it is consistent with the Ninth Circuit's decision in *Amaro v. Continental Can Co.*, 724 F.2d 747, 750-52 (1984)[3] and the District of Columbia Circuit's decision in *Air Line Pilots Association v. Northwest Airlines, Inc.*, 627 F.2d 272, 278 (D.C. Cir. 1980). (*Alfarone* and *Air Line Pilots Association*, ERISA cases, do not involve section 510.)

In a dissent to this Court's denial of *certiorari* in *Mason*, Justice White (joined by Justice Brennan) discussed the need to grant *certiorari* on the issue of exhaustion in ERISA cases:

> I believe that the Court should grant *certiorari* in this case in order to resolve the uncertainty over the existence of an exhaustion requirement in cases of this kind. The increasing significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket; in a field so productive of federal litigation, the need for clear procedural rules governing access to the federal courts is imperative. Moreover, because the coverage of particular ERISA plans frequently extends to beneficiaries in more than

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[3] The issue of exhaustion has been raised again in the district court based on the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), decided subsequent to the 9th Circuit decision. The circuit remanded the action to the district court for further adjudication. The district court denied the defendant's exhaustion argument implicitly and then denied its § 1292(b) motion to have the issue of exhaustion certified. Hence, appeal of the exhaustion claim in the 9th Circuit awaits completion of the trial.

> one state—and, no doubt, in more than one judicial circuit—differences in the rules governing access to federal court for the purpose of pressing a claim under ERISA may have the troubling effect of encouraging forum-shopping by plaintiffs.

Mason, 106 S. Ct. at 863.

The problems highlighted by Justice White have worsened since his dissent. Those seeking to avoid the need to pursue arbitration provisions of collective bargaining agreements can attempt to file in the Third or Ninth Circuit even when their actions may have arisen primarily in other circuits (*e.g.*, Seventh and Eleventh). Petitioner is a prime example of such disparity. When it was sued in the Eleventh Circuit, the suit was dismissed for failure to exhaust. *Mason*. Yet, when the same causes were asserted in the Third and Ninth Circuits, a contrary ruling on exhaustion was made. *Gavalik*, *Amaro*. Now Continental is confronted with a nationwide class action in the Third Circuit. *See McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492 (D.N.J. 1985). If this action had been filed in the Seventh or Eleventh circuits, exhaustion would be a bar.

The Third Circuit's *Gavalik* decision also conflicts with a recent decision of this Court and with the statutory intent of Congress in passing the ERISA statute. The Third Circuit has allowed its distrust of arbitration to override the language of the statute, congressional intent, and the principles of federal common labor law.

Until this issue is resolved, an air of uncertainty will surround collective bargaining agreements and the CBA negotiation process. The policy of our federal labor laws, which is "to promote industrial stabilization through the collective bargaining agreement" (*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 at 578 (1960)), will be at risk.

A. This Court Should Grant Certiorari to Resolve the Conflict among the Circuits.

1. Arbitration Is a Favored Remedy in Disputes Between Management and Labor.

In its "role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements" (*Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 at 567 (1960)), this Court has consistently affirmed a basic tenet of federal common labor law: the use of arbitration for the resolution of disputes. As noted in *Steelworkers v. Warrior & Gulf Navigation Co., supra*, 363 U.S. at 580, "[a] collective bargaining agreement is an effort to erect a system of industrial self-government." "[T]he grievance machinery under a collective bargaining agreement is at the very heart of industrial self-government." *Id.* at 581.

One of the controversies that has surrounded arbitration arises from the intersection of the right to arbitrate contract-based claims and the right to judicial enforcement of statutorily-created rights. This Court has held that access to judicial remedies for some rights created by statutes may not be deferred to arbitration.[4] More recently, how-

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[4] *McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265, 268-270 (1958) (Universal Military Training Service Act, 50 U.S.C. app. § 459(d); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 354 (1971) (Seaman's Wage Act, 46 U.S.C. § 596, 597); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44-49 (1974) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981) (Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219; *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (Civil Rights Act of 1871, 42 U.S.C. § 1983). These cases are distinguishable from cases involving statutory causes of action to enforce contract-based rights such as those to pensions created under CBAs. It appears that misinterpretation of these cases by failure to note that distinguishing factor has given rise to controversy between the circuits. *See* discussion *infra*. *See also Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-72 and n.14 (1984) (Court did not

ever, in *Mitsubishi* this Court has reaffirmed that the federal policy favoring arbitration, as embodied in the United States Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, is entitled to as much deference as the policies espoused in other federal statutes. The Court articulated a two-step analysis to determine whether statutory rights may be deferred to arbitration. The first step requires the analyzing court to interpret the governing contract to determine whether the parties intended the dispute at issue to be resolved by the arbitration procedures of the agreement. In this step, there is a strong presumption of arbitrability unless the CBA expressly excludes the particular type of dispute at issue from the grievance procedures. *AT&T Technologies v. Communications Workers*, 106 S. Ct. 1415, 1419 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-85 (1960).[5] The second step requires the court to examine the statute giving rise to the claims at issue and to review its legislative history. The purpose is to determine whether there is an indication that the legislature intended to prevent employers from enforcing CBA provisions for arbitration of pension-related disputes.

By implication, since the policy favoring arbitration under the federal labor statutes (including section 203(d) of the Labor Management Relations Act, 1947, 29 U.S.C. § 173(d)) is as strong as that of the Arbitration Act, the guidance of this Court in *Mitsubishi* should be applied in

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reach issue of whether a CBA requirement for arbitration of ERISA claims would be lawful because it held that trustees of employee-benefit funds are not parties to the CBA.)

[5] The trial court found that the claims of the plaintiffs were not covered by their collective bargaining agreement. Although the finding was cross-appealed, the circuit court did not discuss the issue in its opinion. The arbitration sections of the master agreement appear in the appendix as pages 105a-118a; and those from the pension agreement at 119a-130a. Because no grievance is excluded from the arbitration provisions of the CBA in issue, the trial court's finding is plainly erroneous. *AT&T, Warrior & Gulf Navigation Co., supra.*

the collective bargaining arena.[6] The attempt to discern the intent of the legislature that created ERISA is the source of controversy among the circuits.

2. The Third and Ninth Circuits Misinterpreted the Legislative History of ERISA; the D.C. Circuit Did Not Consider It.

The Third Circuit in *Gavalik* considered itself bound by *Zipf v. Amerian Telephone and Telegraph Co.*, 799 F.2d 889 (3d Cir. 1986). Although it did not specifically apply the *Mitsubishi* test to discern a legislative intent against arbitrability in *Zipf*, the court, in *Gavalik*, found that "[i]n *Zipf* the approach approved in *Mitsubishi* was not contravened." *Gavalik* at 32.[7]

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[6] The apparent application of *Mitsubishi* to collective bargaining agreements is indicated in the opinion itself when this Court cites a case from the *Steelworkers Trilogy*, *Steelworkers v. Warrior & Gulf Navigation Co.* as an example of an instance when the Court has favored arbitration under the criteria established by the decision. *Mitsubishi*, 105 S.Ct. at 3354.

[7] The court indicated its basis for this observation:

> The *Zipf* Court *did not resort to a presumption of unarbitrability*, but rather sought to ascertain congressional intent on the question of arbitrability of substantive discrimination claims under § 510 of ERISA. Its examination of the legislative intent of § 510 revealed an express desire that claims brought thereunder be submitted to the courts. "Indeed, an amendment that would have created an administrative remedy for section 510 claims, to be established by the Department of Labor, was defeated." *Zipf*, 799 F.2d at 892.

Gavalik at 32 (emphasis added). Review of the legislative history demonstrates that the defeated amendment was intended to cover those employees who were not protected already by a collective bargaining agreement providing administrative remedies. The amendment was defeated based on its cost, not from any antipathy to administrative and arbitral remedies. 119 Cong. Rec. 30,374-75, 30,399-401 (1973), *reprinted in* Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2d Sess., Legislative History of the Employee Re-

In its decision in *Amaro*, the Ninth Circuit distinguished its previous finding of an exhaustion requirement for ERISA-based claims, *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980), on the grounds that the latter case involved a request for declaration of the parties' rights under a pension plan, whereas in the case before it, the claim did not specifically arise from breach of contract.

The D.C. Circuit in *Air Line Pilots Association* did not review ERISA's legislative history; the court relied on *Alexander* for its finding that the plaintiffs did not need to arbitrate their statutory claims.

3. The Seventh, Eleventh, and Second Circuits Rely on a Consistent Reading of the Statute.

In *Kross* the Seventh Circuit found itself in agreement with the Ninth Circuit's decision in *Amato*. In that case the court found from its review of the statute that the exhaustion of administrative remedies was a necessary step before action could be taken in federal court.[8]

In *Mason*, the Eleventh Circuit reviewed the pertinent cases from the Ninth Circuit (*Amaro* and *Amato*) and agreed with *Amato* and with the Seventh Circuit (in *Kross*). It commented: "[i]n addition, imposing an exhaustion requirement in the ERISA context appears to be consistent with the intent of Congress that pension plans provide intrafund review procedures." *Mason*, 763 F.2d at 1227.

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tirement Income Security Act of 1974 (Comm. Print 1976) [hereinafter cited as Leg. Hist.] Vol. 2, at 1774-76, 1834-37.

[8]

> It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary [of Labor] to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used.

Kross, 701 F.2d at 1245, quoting from *Amato*, 618 F.2d at 567.

In *Alfarone*, the Second Circuit relied on the "firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases" (788 F.2d at 79) and cited *Kross*.

The question is clear: did Congress in enacting section 510 of ERISA intend to prevent an employer from enforcing a CBA provision for arbitration of pension disputes? The answers of the circuits are in conflict: the Third Circuit, Ninth Circuit and D.C. Circuit have found that Congress did intend to prevent arbitration of ERISA rights; the Seventh, Eleventh, and Second Circuits have found that Congress intended for ERISA disputes to be handled by arbitral forums.

4. The Third, Ninth and D.C. Circuits Are in Conflict with an Accurate Reading of Legislative History and the Decisions of this Court.

The ERISA statute provides access to federal courts under section 502. It makes no reference to arbitration of the claims (including section 510 claims) that may be brought under section 502. There are no anti-waiver provisions in the statute; thus it does not foreclose arbitration in the manner of the Securities Act of 1934 as has been found in *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197, 1201 (3d Cir. 1986). The provision is similar to those in the Clayton Act and RICO under which courts (in *Mitsubishi* and *Jacobson*, respectively) have found statutory claims to be arbitrable.

Indeed, it contains a provision, section 514(d), that indicates that the statute was not meant to overrule any existing U.S. laws:

> Nothing in this subchapter [which includes sections 502 and 510 of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . .

29 U.S.C. § 1144(d).

ERISA became law in 1974, long after the *Steelworkers Trilogy*[9] had established deference to arbitration as part of the federal common labor law. Thus, it cannot be construed to override the well-established deference to arbitration as a method of dispute resolution under federal labor law. *See Air Line Pilots Association*, 627 F.2d at 276.

Review of ERISA's history makes it clear that the drafters believed that employees operating under a CBA had an efficient dispute resolution mechanism whereas it was employees without such a mechanism that needed the proposed administrative procedures (*see* 119 Cong. Rec. 30,374-75, 30,399-401 (1973), *reprinted in* Leg. Hist., *supra*, at 1774-76, 1834-1837). This perception is typified by Senator Hartke's comment:

> Senator Hartke: Most collective bargaining agreements protect employees against discharge without cause and provide effective enforcement machinery in arbitration proceedings whose results are enforceable under section 301 of the Labor-Management Relations Act.

Leg. Hist., *supra*, at 1774.

The legislative record demonstrates a bias in favor of arbitration rather than against it and contains a strong indication that the legislators presumed that arbitration procedures under CBAs would be available for the enforcement of rights under ERISA including section 510 rights. Indeed, civil actions are to be regarded as arising "'*in similar fashion to those brought under § 301 of the Labor Management Relations Act of 1947.*' H. R. Conf. Rep. No. 93-1280, p. 327 (1974) (emphasis added)." *Metropolitan*

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[9] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Life Insurance Co. v. General Motors Corp., 55 U.S.L.W. 4468, 4470 (U.S. April 6, 1987)

Relying on a narrow and incorrect reading of the legislative history of ERISA, the Third Circuit has foreclosed the use of arbitration in one of the areas under federal common labor law where it has traditionally been used to resolve problems, *i.e.*, in the area of pension rights. Such a reading places the circuit in conflict with this Court's decision in *Mitsubishi*.

5. The Conflict Can Only Be Resolved By this Court.

The Eleventh Circuit, finding that the intent of the legislature in ERISA allowed for arbitral resolution of disputes under the statute, did so in the full knowledge of differences between the Seventh Circuit in *Kross* and the Ninth Circuit in *Amaro*. The Third Circuit, in finding in *Gavalik* that the intent of the legislature was to prevent deferral of disputes to arbitration, did so with the full knowledge that the Seventh Circuit and the Eleventh Circuit had found otherwise.[10] Thus, the circuits are in disagreement with each other, a disagreement which will cause increasing damage to labor-management relations in the workplace. This Court is the only judicial body that can resolve the dispute.

B. Conflict and Confusion Among Lower Courts Calls for Speedy Resolution in Order to Avoid Increased Caseload and Chaos in the Labor-Management Arena.

In 1986, thirty-eight cases involving disputes over ERISA and exhaustion were decided in federal courts. *See* App. at 131a-134a. With the present controversy between circuits, that number threatens to burgeon. Because of the controversy, those participating in ongoing labor-manage-

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[10] Although the *Kross* and *Mason* cases are not specifically mentioned in the Third Circuit's opinion in *Gavalik*, the cases were called to the court's attention in Continental's Brief of Appellee-Cross Appellant filed with the court on Feb. 14, 1986.

ment negotiations cannot bargain confidently for the resolution of pension-related disputes by arbitration. Thus, controversy over pension rights/liabilities and the proper method for resolving disputes vitiates the essence of contract-bargained industrial peace. The plain need for resolution of the conflict between the circuits and the importance of a prompt resolution to industrial peace justify granting *certiorari* in this case.

II. THE THIRD CIRCUIT'S APPLICATION OF A SIX-YEAR STATUTE OF LIMITATIONS IS IN CONFLICT WITH THE BASIC TENETS OF FEDERAL LABOR POLICY AND SEVERAL PRIOR DECISIONS OF THIS COURT.

> Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.

Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).

As emphasized by this Court in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), and subsequently in *DelCostello v. Teamsters*, 462 U.S. 151, 161 (1983), Justice Rehnquist's observation is nowhere more true than in the context of "those consensual processes that labor law is chiefly designed to promote—the formation of the collective [bargaining] agreement and the private settlement of disputes under it." *DelCostello*, 462 U.S. at 163 (explaining the need for national uniformity in the federal labor law context) (*quoting UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966)).

The importance of SOL uniformity has been emphasized again in a case concerning racial discrimination claims. *Wilson v. Garcia*, 471 U.S. 271 (1985).

Disputes in the labor arena must also be resolved quickly: "[O]ne of the leading federal policies in this area is the

'relatively rapid resolution of labor disputes.' " *Mitchell*, 451 U.S. 63 (*quoting Hoosier*, 383 U.S. at 707). Thus, this Court rejected such state SOL periods as that for legal malpractice (three to ten years) and that for contracts disputes (six years):

> This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.

Mitchell, 451 U.S. at 64.

When it enacted ERISA, Congress preempted state pension laws, 29 U.S.C. § 1144(a). This indicates a congressional intent that there be uniform federal remedies for the enforcement of pension rights. "This provision demonstrates that Congress . . . meant to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 523 (1981). *See also Metropolitan Life Insurance Co. v. General Motors Corp.* 55 U.S.L.W. 4468 (U.S. April 6, 1987).

The Third Circuit's decision threatens to permit the very chaos warned of in *Mitchell*. Indeed, subsequent to the denial of their grievances, and without proceeding to arbitration, the petitioner's employees brought suit in federal court, based on section 510 of ERISA, 29 U.S.C. § 1140. As in *DelCostello* and *Mitchell*, they alleged that their employment was wrongfully terminated. As in those two cases the employees sought to avoid the impact of unsuccessful grievances. As in *Wilson*, the claims were based on discrimination.

Because Congress has not expressly provided for limitations periods applicable to enforcement actions in federal court under section 502, the district court and the Third

Circuit decided to apply Pennsylvania's residuary six-year statute to the employees' claims. Thus, an employer's personnel decisions are subject to federal court review as much as six years after the fact. This result is not only irreconcilable with federal labor policy, it is also in direct conflict with the decisions of this Court in *DelCostello*, *Mitchell*, and *Wilson*.

Correction of the circuit's error is all the more important because it implicates a very fast growing area of labor law. As reported by the Pension Benefit Guaranty Corporation (PBGC) in its 1985 Annual Report to Congress, at 1, about 38 million American workers now participate in some 112,000 insured benefit plans under ERISA. Concurrent with ERISA's key role in the labor market, the number of ERISA cases has grown dramatically in the various courts. A substantial number of those cases have involved statute of limitations questions.[11] The lack of direct guidance on a limitations period for ERISA-based

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[11] 29 U.S.C. § 1113 provides that a three- or six-year limitations period applies to actions for violations of §§ 1101-1114 (enacting rules of fiduciary responsibility). ERISA provides no statute of limitations for actions brought pursuant to section 502 of ERISA, 29 U.S.C. § 1132, to remedy violations of other parts of ERISA. *Kuntz v. Reese*, 760 F.2d 926, 936 (9th Cir. 1985), *op. withdrawn & decision vacated*, 785 F.2d 1410 (1986).

In actions under 29 U.S.C. § 1140, the following state statutes of limitations have been applied: state action for termination of employment-2 years, *Corkery v. SuperX Drugs Corp.*, 602 F. Supp. 42 (M.D. Fla. 1985); state contract action-6 years, *Delisi v. United Parcel Serv. Inc.*, 580 F. Supp. 1572 (W.D. Pa. 1984), state period for statutory actions-6 years, *Cowden v. Montgomery County Soc'y for Cancer Control*, 591 F. Supp. 740 (S.D. Ohio 1984); state residuary statute of limitations-6 years, *McLendon*, *supra*.

Some courts, however, have applied ERISA's built-in limitations statute, 29 U.S.C § 1113, outside the context of a §§ 1101-1114 violation. *See, e.g., Edwards v. Wilkes-Barre Pub. Co. Pension Trust*, 757 F.2d 52 (3d Cir.) (action to compel recalculation of benefits), *cert. denied*, 106 S. Ct. 130 (1985).

claims has resulted in confusion among the courts, considerable opportunity for forum shopping and great uncertainty for private litigants.

Finally, even if the Third Circuit need not follow this Court's teachings in *DelCostello*, *Mitchell*, and *Wilson*, its decision to apply a six-year statute misapplies this Court's traditional instructions (*see, e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946)) for selection of a state statute of limitations. Specifically, under current Pennsylvania law no limitations period longer than two years could be applied. Indeed, *Gavalik* is in direct conflict with the Third Circuit's own precedent explicitly recognizing the changes in the Pennsylvania statute of limitations.

A. The Gavalik Opinion is Violative of the Principles Espoused by this Court in *DelCostello* and *Mitchell*.

The *Gavalik* Panel correctly identified the criteria for application of the six-month statute of limitations of section 10(b) of the Labor Management Relations Act (LMRA), 29 U.S.C. 160(b) under *DelCostello*, *supra*. In attempting to apply these criteria, however, the Third Circuit panel erroneously found that: a) section 510 actions do not resemble claims charging unfair labor practices, Slip op. at 26 (App. at 26a); b) the instant dispute does not threaten the bargaining relationship, *id.* at 27 (App. at 27a); and c) the desire for uniformity is not a factor because the claims are not asserted under a collective bargaining agreement. *Id.*

1. The Family Resemblance between Actions under Section 510 and a Charge of an Unfair Labor Practice

As stated by Senator Hartke in the debate on ERISA, the language of section 510 "parallels § 8(a)(3) of the NLRA." 119 Cong. Rec. 30,374 (1973), *reprinted in* Leg. His., *supra*, at 1775. *See also West v. Butler*, 621 F.2d 240, 245 nn.4-5 (6th Cir. 1980). Thus, the Third Circuit's finding that there was no family resemblance between sec-

tion 510 actions and charges of unfair labor practices is facially incorrect.

2. The Need for Rapid Final Resolution of Disputes where the Collective Bargaining Agreement and Private Settlement of Disputes are Implicated

As in *DelCostello* and *Mitchell*, the former employees in the present case have a grievance/arbitration procedure to handle disputes pertaining to, *inter alia*, pension rights. Avoiding arbitration constitutes "a direct challenge to 'the private settlement of disputes under the [collective-bargaining agreement].' " *Mitchell* at 66 (quoting *UAW v. Hoosier Cardinal Corp.*, 383 U.S. at 702). Application of the six-month period of § 10(b) would strike a balance between the interests of employees in redressing grievances and the federal interest in industrial peace:

> The 6-month bar of § 10(b) is designed to strengthen and defend the "stability of bargaining relationships." *Machinists v. NLRB*, 362 U.S. 411, 425. The time limitation reflects the balance drawn by Congress, "the expositor of the national interest," *id.*, at 429, between the interest of employees in redressing grievances and "vindicati[ng] [their] statutory rights," *ibid.*, and the "interest in 'industrial peace which it is the overall purpose of the Act to secure.' "

Mitchell, 451 U.S. 68-69 (Stewart, J., concurring) (footnote omitted).

Since pension rights are a negotiated item in many CBAs, all parties benefit from a prompt resolution of disputes over entitlement to pensions and actions alleging discriminatory deprivation of pension benefits.

3. The Need for Uniformity where the Formation of the Collective Bargaining Agreement and the Private Settlement of Disputes under it are Implicated

As this Court stated in *DelCostello*, there is a special need for uniformity where the case involves "those con-

sensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it." *DelCostello* at 162-163.[12] As in *DelCostello*, plaintiffs are attempting to avoid the application of the grievance procedures established by the CBA. *Supra*, Introduction. *See also* 119 Cong. Rec. 30,374 (1973), *reprinted in* Leg. Hist., *supra*, at 1774 (CBAs provide enforcement through arbitration against discharge without cause) *and* 119 Cong. Rec. 30,400-401 (1973), *reprinted in* Leg. Hist., *supra*, at 1836-37 (union employees' disputes on discharges handled through arbitration).

Thus, all the factors that led this Court to choose the six-month limitation period in *DelCostello* are present in the instant case. There is a recognized strong family resemblance between the action at issue and unfair labor practice charges. In addition, the instant claim, as did the one in *DelCostello*, strongly implicates collective bargaining and private dispute settlement, thus raising important issues of uniformity and the need for rapid conflict resolution. If state law is applied, similar claims by employees in different states will be subject to drastically different limitations periods. As was the case in *DelCostello*, application of the six-month period would reflect the appropriate balance as perceived by Congress between rapid

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[12] Although the circuits have not mechanically limited *DelCostello* to its strict *Vaca-Sipes* context, there is disagreement among the courts as to the reach of *DelCostello* as this Court has recognized in its denial of *certiorari in Davis v. UAW*, 106 S. Ct. 1284, (1986) (White J., dissenting) (conflict among the circuits concerning the application of six-month period to actions against the union under the Labor-Management Reporting and Disclosure Act). *See also Adams v. Gould Inc.*, 739 F.2d 858, 867 (3d Cir. 1984), (*DelCostello* not applicable in pension context), *cert. denied*, 469 U.S. 1122 (1985) (White, J., dissenting, with Brennan and Powell, JJ., joining) (the rule adopted by *Gould* "departs from the policy we recently announced in *DelCostello* of having a single statute of limitations for fair representation suits.").

conflict resolution and the need to offer plaintiffs an adequate remedy.

B. Application of *Wilson*

The Third Circuit's refusal to apply a limitations period similar to that applicable under 42 U.S.C. § 1983 represents an unduly narrow interpretation of *Wilson* and cannot be reconciled with the Third Circuit's own precedent. The district court cited *Knoll v. Springfield Township School Dist.*, 699 F.2d 137, 141 (3d Cir. 1983) ("*Knoll I*"), in an interlocutory order in 1983 and analogized the employment discrimination claims of the employees to federal discrimination actions under 42 U.S.C. § 1983, which were then subject to a 6-year limitations period in Pennsylvania. Prior to the Third Circuit's determination in the present case, *Knoll I* was vacated, 471 U.S. 288 (1985), and federal actions under 42 U.S.C. § 1983 became subject to Pennsylvania's two-year limitations statute. *Wilson*; *Knoll v. Springfield Township School Dist.*, 763 F.2d 584 (3d Cir. 1985) (on remand—applying two-year injury statute instead of six-year residuary period).

Although Congress itself analogized section 510 ERISA claims to discrimination actions, and although resort to the same limitations period as applied to discrimination actions based on race would further both the federal interest in uniformity and the relatively short limitations periods for labor claims required by *DelCostello* and *Mitchell*, *supra*, the Third Circuit nevertheless disavowed the analogy that had been made by the lower court, and, interpreting *Wilson v. Garcia* as relevant only within its strict 42 U.S.C. § 1983 context, rejected the analogy to federal discrimination claims.

1. The Analogy to Federal Discrimination Actions is Compelling.

Section 510 was characterized by Congress as "a remedy for any person fired such as is provided for a person

discriminated against because of sex." 119 Cong. Rec. 30,044 (1973), *reprinted in* Leg. Hist., *supra*, at 1641. Thus, Congress intended section 510 to provide an identical remedy to that existing under § 1983 cases. *See also Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 810 (10th Cir. 1984) (section 510 creates "a claim for retaliatory action by the employer similar to that under the civil rights laws").

2. The Federal Interest in Uniformity

Wilson's identification of a national interest in uniformity was based on the remedial nature of the statute. An analogy to federal discrimination claims, whose limitations period is determined by the state limitations period applicable to personal injury actions would comport with this same federal interest, and would resolve the confusion among the courts as to the period of limitations for § 510 actions. *Supra*, note 11. In addition, such an analogy would subject all discrimination actions, whether based upon race (42 U.S.C. § 1983) or pension (29 U.S.C. § 1140), to the same limitations period and would comport with Congress' intent in enacting section 510.

3. The Need for Short Limitations Periods

Analogy to the two-year limitations period of *Wilson* also comports with the federal interest in the rapid resolution of labor conflicts. *Mitchell*; *DelCostello*.[13]

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[13] *Wilson*, according to the test articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-7 (1971), applies retroactively to the action in issue. At the time this action was brought there was no precedent upon which the plaintiffs could reasonably have relied to expect that a court would apply a six-year limitations period. Moreover, even if plaintiffs could foresee that the Court would liken their claims to actions under 1983 (which they could not), their action *predates* the Third Circuit's decisions in *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (1983) and *Perri v. Aytch*, 724 F.2d 362 (1983) establishing a six-year limitations period to § 1983 actions. *See Smith v. City of Pittsburgh*,

C. State Limitations Periods

Even if actions under section 510 are not subject to the statute of limitations provisions identified in *DelCostello* and *Wilson*, the Third Circuit's decision to apply a six-year period is violative of the principles imposed by this court on the selection of limitations periods when no suitable federal alternatives are available and is in conflict with the Third Circuit's own precedent.

The Third Circuit premised its use of a six-year period on the assumption that this is the period applicable to actions for employment discrimination in Pennsylvania. *Gavalik* at 16.[14]

There is no specific limitations period in Pennsylvania for actions for employment discrimination. Thus, for SOL purposes, Third Circuit precedent has uniformly analogized discrimination claims to common law actions for tortious interference. *Knoll I*, 699 F.2d at 141 ("We have analogized a claim of employment discrimination brought under the federal Civil Rights Acts, to 'those torts which involve the wrongful interference with another's economic rights or interests.' "), *quoting Skehan v. Board of Trustees*, 590 F.2d 470, 477 (3d Cir. 1978), *in turn quoting Davis v. United States Steel Supply*, 581 F.2d 335, 339 (3d Cir. 1978).[15]

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764 F.2d 188, 195 (3d Cir. 1985) (applying Wilson retroactively to 1983 action where action brought prior to *Knoll* and *Perri*); *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 345 n.10 (3d Cir.), *cert. granted*, 107 S.Ct. 509 (1986).

[14] The court in *Gavalik* cites only one state court opinion that supports its holding: *Skehan v. Bloomsburg State College*, 503 A.2d 1000 (Pa. Commw. 1986). The applicable SOL was not a matter of dispute in that case.

[15] *See also Mazzanti v. Merck Co.*, 770 F.2d 34, 35 (3d Cir. 1985), *citing Knoll I (supra) and Fitzgerald v. Larson*, 741 F.2d 32, 36 (3d Cir. 1984), *vacated on other grounds*, 472 U.S. 1051 (1985) (action alleging discharge based on political affiliation); *Meyers v. Pennypack*

Pursuant to the revised Pennsylvania SOL, common law actions for tortious interference are now subject to a two-year period. *Home for Crippled Children v. Erie Insurance Exchange*, 130 P.L.J. 480 (Allegheny County Court of Common Pleas 1982), *aff'd mem.*, 329 Pa. Super. 610, 478 A.2d 84 (1984) (discussing at length the effect of the changes in the Pennsylvania statute of limitations); *Bender v. McIlhatten*, 520 A.2d 37 (Pa. Super. Ct. 1987). This state court interpretation of the applicable SOL has been specifically adopted by the Third Circuit. *Mazzanti*, 770 F.2d at 34. Thus, the Third Circuit's analogy in *Gavalik* to a 6-year residual period is erroneous on its face.

III. THE THIRD CIRCUIT'S "A DETERMINATIVE FACTOR" TEST FOR CAUSATION IN MIXED-MOTIVE DISCRIMINATION CASES CONFLICTS WITH THIS COURT'S "SAME DECISION" TEST.

In mixed-motive discrimination cases, this Court has applied a "same decision" test to determine causation. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252 (1977); *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

The test is:

> 1. The employee must first show that the proscribed factor is a "motivating" or "substantial" factor in the employer's personnel action.

Woods Home Ownership Ass'n, 559 F.2d 894, 904 (3d Cir. 1977).

Statutory discrimination claims in Pennsylvania, another possible analogy, are subject to limitations periods of two years or less. *See, e.g.*, Pa. Stat. Ann. tit. 43, § 336.5 (Purdon 1986 Supp.) (two years for wage discrimination on the basis of sex); Pa. Stat. Ann. tit. 43, § 959(g) (Purdon 1986 Supp.) (complaints alleging discrimination in an employment context must be filed with the Pennsylvania Human Relations Commission within 90 days after the act); Pa. Stat. Ann. tit. 43, § 1101.1505 (Purdon 1986 Supp.) (four-month period for filing of unfair labor practice charge).

> 2. If the employee carries this burden, the employer may defeat liability by proving by a preponderance of the evidence that it would have reached the same decision even in the absence of the proscribed factor.

As described in *Mt. Healthy* at 287.

In *Gavalik*, after an extensive trial, the district court found permissible and non-permissible motives, but concluded that the same results would have occurred in any event. *Gavalik*, Findings of Fact and Conclusions of Law, FF 106, 107, 141, 142 (Sept. 24, 1985) (App. at 86a, 90a).

The appellate court reversed, believing that the trial court had misapplied the burdens of proof. Slip op. at 53-56 (App. at 52a-54a.) However, rather than remand the case to the district court for reconsideration of the evidence in light of the corrected standard and permitting such supplemental proceedings as might have been warranted, the Third Circuit held that liability had been established. Slip op. at 63 (App. at 60a-61a.)

In so doing, the Third Circuit effectively eliminated petitioner's opportunity to present any defense against the alleged liability. The Third Circuit ignored the findings of fact by the trial judge, ignored the due process requirements of the Constitution, and ignored the *Mt. Healthy* standard clearly articulated by this Court.

The Third Circuit's approach was based on "a determinative factor" test for causation[16] similar to the "in

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[16] *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 791 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 796 (1986) (The plaintiff must prove that age was a determining factor); *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 1244 (1986) ("The 'but for' test does not require a plaintiff to prove that the discriminatory reason was 'the' determinative factor, but only that it was 'a' determinative factor."); *Dillon v. Coles*, 746 F.2d 998, 1005 (3d Cir. 1984); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir.

part" test for causation expressly rejected by this Court in *Mt. Healthy*.

A. Application of the Third Circuit's "A Determinative Factor" Test in Gavalik Conflicts with Decisions of this Court.

The Third Circuit explained its standard in *Gavalik*: "[s]imilarly, § 510 of ERISA requires no more than proof that the desire to defeat pension liability is a 'determinative factor.' " Slip op. at 54 (App. at 52a). Under the Third Circuit's test, a plaintiff establishes liability by a showing that the alleged proscribed motive is "a determinative" factor even if the defendant proves by a preponderance of the evidence that the "same decision" would have occurred absent the proscribed motive.

The basic error committed by the Third Circuit in *Gavalik* lies in denying the defendant/employer the entitlement to defeat liability to the plaintiff class by proving that the challenged employment actions were caused by legitimate non-discriminatory reasons.

Notwithstanding the trial court's holding of no liability in conformance with this Court's teachings, the Third Circuit held that the plaintiff's evidence *ipso facto* established liability. It did not remand the case to the trial court to afford the defendant its due process right of showing by a preponderance of the evidence that the challenged employment actions would have occurred absent the proscribed motive. *Hazelwood School District v. United States*, 433 U.S. 299 (1977). The Third Circuit apparently recognized that the defendant/employer has a right to prove that legitimate non-discriminatory reasons caused the challenged actions but with its remand order is allowing the defendant/employer only to limit damages to individual

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1984), *cert. denied*, 469 U.S. 1087 (1984); *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984); *Smithers v. Bailar*, 629 F.2d 892, 898 (3d Cir. 1980).

plaintiffs with such a showing. Slip op. at 68-69 (App. at 65a.) On remand, the plaintiffs are entitled to a presumption of liability.

The Third Circuit's holding in *Gavalik* conflicts with decisions of this Court in which defendants in mixed-motive discrimination cases can refute liability with proof that their challenged action was caused by a legitimate motive or that the same decision would have been made absent the proscribed factor. This test of causation is pervasive in labor and discrimination cases of all kinds.[17] The mixed-motive burden of proof procedure that has been applied by this Court in other types of discrimination cases is equally applicable to allegations of pension discrimination.

B. The Third Circuit Panel Incorrectly Applied the Same Decision Test at the Wrong Stage of the Case.

Both the plaintiffs' and the defendant/employers' showing as to causation must occur before the trier of fact can determine liability *vel non* to the class. *See Teamsters*, 431 U.S. at 361; *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984).

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[17] Whether based on: a) race, color, or national origin under civil rights statutes, 42 U.S.C. §§ 2000 *et seq.* and 42 U.S.C. §§ 1981 and 1983 (*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Sys., Inc.*), b) race under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, (*Arlington Heights v. Metro Hous. Corp.*, 429 U.S. 252 (1977)); c) union activity under the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* (*NLRB v. Transp. Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 150 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)); d) age under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, (*Pace v. So. Ry. System*, 701 F.2d 1383, 1385-88 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983)); or e) the Equal Protection Clause of the 14th Amendment to the Constitution of the United States (*Arlington Heights v. Metro Hous. Corp., supra*).

The Third Circuit permits application of the "same decision" test in *Gavalik* only after it has found liability to the class. *Gavalik* at 62, 64 (App. at 59a-60a, 61a.)

The Third Circuit has erred because under the above-cited precedents of this Court, the defendant's burden of proving that the same result would have occurred absent the proscribed motive *is an integral part of the liability phase of the case.* The Third Circuit itself has previously recognized that this is true.[18]

The court's decision even conflicts with the Eleventh Circuit cases upon which it relied at 46 and 47 (App. at 45a-46a), because in those cases, the employer was allowed to refute liability by proving that the same result would have occurred absent the proscribed factor. *Lee v. Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556-57 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

The Panel's error can readily be seen by comparing the following two quotes, the first from *Gavalik* and the second from *Lewis v. University of Pittsburgh*:

> The district court erred, however, in not recognizing that appellants carried their burden of proof on causation by establishing that Continental's challenged decisions were motivated by both permissible and impermissible factors.

Slip op. at 68.

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[18] In *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984), the court stated:

> Included in the defendant's rebuttal would be evidence that absent discrimination the plaintiff would not have been hired or promoted because of lack of qualifications, curtailment of operations, or similar matters. This burden of production resting on the employer goes to liability, not relief, and is governed by *Burdine*.

Id. at 1004-05.

> There may be several determinative factors which lead to any given decision, all of which can be "but for" causes of the challenged action. The ultimate "but for" test, however, subsumes within its determination all such factors.

Lewis, 725 F.2d at 917 n.8 (3d Cir. 1983).

Under *Mt. Healthy* the ultimate "but for" test is, would the "same decision" have occurred absent the proscribed factor? The Third Circuit's decision in *Gavalik* holds that there is class liability based on an impermissible motive *regardless of the existence of other legitimate motives* and regardless of the district court's findings of fact that the same results would have occurred in any event.

Motive and causation are essential elements of a section 510 violation under ERISA. Assuming *arguendo*, that this Court holds that the Third Circuit's test for causation is permissible, the Third Circuit nevertheless misapplied the test here.

Normally, appellate courts do not consider issues which have neither been presented at trial nor decided by the district court. *Singleton v. Wulff*, 428 U.S. 106, 119 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). The Third Circuit has erred in deciding issues concerning a discriminatory "plan" and "recalls" which were not addressed by the district court.

The trial court did not reach a conclusion concerning an alleged discriminatory "plan". *Gavalik*, at 40 (App. 40). Continental argued on appeal that the "plan" was not before the district court. *Gavalik*, at 41 n.34 (App. at 41a). Nevertheless, the circuit court held that the "plan" was violative of section 510 and corrected its opinion on plaintiffs' petition to permit damages for failure to recall. The panel looked only to the allegations contained in the complaint (*id.*) and ignored how the plaintiffs had expressly

waived issued other than layoffs at trial. (record in *Gavalik*, joint appendix at 418, 469, 470, 766).

The Panel's *de novo* review of the record and its opinion concerning issues not decided below was violative of the appropriate standards of appellate review.

CONCLUSION

For all of the above reasons, this Court should grant a writ of *certiorari* in order to resolve conflicts between the circuits and with the opinions of this Court over 1) the question of whether Congress in enacting ERISA intended to prevent an employer from enforcing a provision in a collective bargaining agreement to arbitrate any pension-related differences, 2) the proper statute of limitations to be applied to claims based on section 502 of ERISA, 29 U.S.C. § 1132, and 3) the right of a mixed-motive discrimination action defendant to defend itself with a preponderance of evidence.

As it has demonstrated throughout the petition, these issues are of great import, affecting the lives of millions of workers and thousands of companies, and because of the extent of inter-circuit controversy, inconsistency with this Court's opinions, and general confusion, may only be resolved by this Honorable Court.

The Continental Can Company strongly urges the Members of the Court to grant a writ of *certiorari* in the present action.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

Nos. 85-3597 and 85-3615

ROBERT GAVALIK, FRANK GRELO, JOSEPH URBAN, ANTHONY ULYAN, DONALD A. BERGER, RONALD CLARKE, HENRY FOSTER, GEORGE PATTERSON, JOSEPH KELLERMAN, ROBERT PAVLIK, PHILLIP FARLEY, THOMAS RILEY, THOMAS WARREN and FRANCIS HUMENIK

v.

CONTINENTAL CAN COMPANY

(D.C. Civ. No. 81-1519)

ALBERT J. JAKUB, FRED CIPRIANA, JR., ANTHONY J. BERNARDO, THOMAS A. MULLIGAN, WILLIAM T. TARR, DONALD W. ROBERTS, ERNEST WIRBECKI and GEORGE W. STEPANIC on behalf of themselves and others similarly situated ALFRED BORRELLI, JR., MICHAEL DI IORIO, ANTHONY FOLINO, THOMAS E. JOHSTON, ROBERT KAPOLKA, JOHN C. KINCEL, PETER A. RUMAIN, HARRY H. SMITH, MELVIN J. SMITH, JACK A. STULL and ERNEST B. TADDEO, on behalf of themselves and others similarly situated

v.

CONTINENTAL CAN COMPANY, a member of Continental Group, Inc.

(D.C. Civ. No. 82-1995)

ROBERT GAVALIK, *et al.* and ALBERT J. JAKUB, *et al.*,
Appellants in No. 85-3597

CONTINENTAL CAN COMPANY, U.S.A., a member of the Continental Group, Inc.,
Appellant in No. 85-3615

(D.C. Civ. Nos. 81-1519; 82-1995)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* SEITZ, ADAMS,* WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges.*

The petition for rehearing filed by Continental Can Company in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ A LEON HIGGINBOTHAM
Circuit Judge

Dated: February 19, 1987

* Honorable Arlin M. Adams, United States Circuit Judge, was present when this case was heard, but did not participate in the decision.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3597 and 85-3615

ROBERT GAVALIK, FRANK GRELO, JOSEPH URBAN, ANTHONY ULYAN, DONALD A. BERGER, RONALD CLARKE, HENRY FOSTER, GEORGE PATTERSON, JOSEPH KELLERMAN, ROBERT PAVLIK, PHILLIP FARLEY, THOMAS RILEY, THOMAS WARREN and FRANCIS HUMENIK

v.

CONTINENTAL CAN COMPANY

(D.C. Civ. No. 81-1519)

ALBERT J. JAKUB, FRED CIPRIANA, JR., ANTHONY J. BERNARDO, THOMAS A. MULLIGAN, WILLIAM T. TARR, DONALD W. ROBERTS, ERNEST WIRBECKI and GEORGE W. STEPANIC on behalf of themselves and others similarly situated ALFRED BORRELLI, JR., MICHAEL DI IORIO, ANTHONY FOLINO, THOMAS E. JOHSTON, ROBERT KAPOLKA, JOHN C. KINCEL, PETER A. RUMAIN, HARRY H. SMITH, MELVIN J. SMITH, JACK A. STULL and ERNEST B. TADDEO, on behalf of themselves and others similarly situated

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CONTINENTAL CAN COMPANY, a member of Continental Group, Inc.

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ROBERT GAVALIK, *et al.* and ALBERT J. JAKUB, *et al.*,
Appellants in No. 85-3597

CONTINENTAL CAN COMPANY, U.S.A., a member of the Continental Group, Inc.,
Appellant in No. 85-3615

(D.C. Civ. Nos. 81-1519; 82-1995)

SUR PETITION FOR PANEL REHEARING

Present: ADAMS,* WEIS and HIGGINBOTHAM, *Circuit Judges.*

In light of the corrected opinion filed February 19, 1987, the petition for rehearing filed by Robert Gavalik, in the above-entitled case and submitted to the judges who participated in the decision of this Court is thereby rendered moot.

BY THE COURT,

/s/ A. LEON HIGGINBOTHAM
Circuit Judge

Dated: February 19, 1987

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* Honorable Arlin M. Adams, United States Circuit Judge, was present when this case was heard, but did not participate in the decision.

CORRECTED OPINION
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3597 and 85-3615

ROBERT GAVALIK, FRANK GRELO, JOSEPH URBAN, ANTHONY ULYAN, DONALD A. BERGER, RONALD CLARKE, HENRY FOSTER, GEORGE PATTERSON, JOSEPH KELLERMAN, ROBERT PAVLIK, PHILLIP FARLEY, THOMAS RILEY, THOMAS WARREN and FRANCIS HUMENIK

v.

CONTINENTAL CAN COMPANY
(D.C. Civ. No. 81-1519)

ALBERT J. JAKUB, FRED CIPRIANA, JR., ANTHONY J. BERNARDO, THOMAS A. MULLIGAN, WILLIAM T. TARR, DONALD W. ROBERTS, ERNEST WIRBECKI and GEORGE W. STEPANIC on behalf of themselves and others similarly situated ALFRED BORRELLI, JR., MICHAEL DI IORIO, ANTHONY FOLINO, THOMAS E. JOHSTON, ROBERT KAPOLKA, JOHN C. KINCEL, PETER A. RUMAIN, HARRY H. SMITH, MELVIN J. SMITH, JACK A. STULL and ERNEST B. TADDEO, on behalf of themselves and others similarly situated

v.

CONTINENTAL CAN COMPANY, a member of Continental Group, Inc.
(D.C. Civ. No. 82-1995)

ROBERT GAVALIK, *et al.* and ALBERT J. JAKUB, *et al.*,
Appellants in No. 85-3597
CONTINENTAL CAN COMPANY, U.S.A., a member of the Continental Group, Inc.,
Appellant in No. 85-3615

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. Civ. Nos. 81-1519; 82-1995)

Argued: June 6, 1986

Before: ADAMS,* WEISS and HIGGINBOTHAM, *Circuit Judges.*

(Filed February 19, 1987)

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* Honorable Arlin M. Adams, United States Circuit Judge, was present when this case was heard, but did not participate in the decision.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This litigation originated in two separate class actions, *Gavalik, et al. v. Continental Can Co., C.A.* No. 81-1519, filed September 18, 1981, and *Jakub, et al. v. Continental Can Co., C.A.* No. 82-1995, filed September 27, 1982, alleging that the institution and implementation of a "liability avoidance" scheme by Continental Can ("Continental") operated to prevent employees from attaining eligibility for employee benefits in violation of § 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (1982).[1] The cases were consolidated on January 17, 1984, and a single class action was certified. The trial of the consolidated action was bifurcated on the issues of liability and damages. The liability phase of the litigation commenced on July 22, 1985, and concluded on August 8, 1985. On September 24, 1985, the district court entered judgment for the defendant, and the plaintiffs appealed to this Court. Continental has cross-appealed asserting that plaintiffs' claims before the district court were barred by the applicable statute of limitations and/or plaintiffs' failure to exhaust their administrative remedies. We reject the contentions of the cross-appeal,

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[1] Section 510 provides, in pertinent part:

> Interference with protected rights
>
> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140 (1982).

and because we find that the district court misallocated the burdens of proof, we will reverse and remand for proceedings consistent with this opinion.[2]

I.
BACKGROUND FACTS

Continental Can is a corporation principally engaged in the business of manufacturing cans. Appellants and the class they represent[3] are former employees of Continental's Pittsburgh plant, which is the focus of this litigation. During the relevant period, appellants were all members of Local 4337 of the United Steelworkers of America, AFL-CIO ("USW"), which was their recognized collective bargaining agent.

In 1977, Continental and the USW negotiated a collective bargaining agreement under which Continental was to provide a comprehensive employee benefit plan. As part of this benefit package, Continental agreed to provide two pension plans for employees who experience a break in continuous service of at least two years.[4] Under the "70/

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[2] The parties have diligently advanced several positions in support of their various claims, some of which are not discussed in the text of this opinion. We have fully considered all arguments raised but have limited our discussion to those we deem central to our holding in this case.

[3] The class certified by the district court consists of:

> all Continental employees who did not achieve eligibility for Rule of 65 or 70/75 pension benefits who were determined by Continental to be permanently laid off in 1976, 1977 or 1978 because of Continental's decision to cap the Pittsburgh plant, including but not limited to all employees whose names fall below Francis Conti's on Continental's seniority roster.

Jt. App. at 175.

[4] Continental's employee benefit plan also provided vision, health, life and disability insurance benefits, supplemental unemployment benefits, and vacation and wage benefits. *See* Findings of Fact ("FF") 23-27.

75 pension," an employee could qualify for pension benefits before reaching age sixty-two, if s/he either (a) had at least fifteen years of continuous service,[5] was fifty years of age or older and had combined age and service equal to or more than seventy years; or (b) had at least fifteen years of continuous service and combined age and service equal to or more than seventy-five.[6] The "Rule of 65" pension[7] was paid to employees with at least twenty years of continuous service on the last day worked, whose combined age and years of service was equal to sixty-five or more but less than seventy-five. Although the 70/75 pension plan had been in effect since 1971, the Rule of 65 was first formally proposed by the USW during the 1977 negotiations.[8] Continental's obligation to pay 70/75 and

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[5] Regular continuous service commenced on the day an employee was hired. A break occurred if the employee was absent for more than two years due to (a) layoff, (b) approved leave of absence, (c) physical disability, or (d) permanent plant shutdown where the employee did not elect to receive severance allowance. *See* FF 19.

[6] Ordinarily, at age sixty-two an employee who had completed ten years of credited service could elect to retire and receive a normal pension. The normal pension consisted of an initial lump sum allowance, covering the first three months of retirement, with subsequent monthly payments based on years of service and job classification. *See* FF 9. The 70/75 pension was equal to the normal pension plus a monthly supplement that continued until the employee became eligible for Social Security.

[7] This benefit was equal to a normal pension, reduced by the amount of income earned by the employee during layoff. *See* FF 15.

[8] Although the Rule of 65 pension plan was first formally proposed by the USW in October 1977, Continental bargaining officials knew prior to the commencement of the 1977 negotiations that the USW would demand the Rule of 65 plan. The steel, aluminum and can industries engage in "pattern bargaining," whereby the same terms, benefits and conditions adopted by the USW and any of these industries is usually requested in the other industries. USW had negotiated a Rule of 65 pension plan with the steel industry in April of 1977 and the aluminum industry in May of 1977. Prior to the negotiations with the can industry, Continental was provided with a copy of the steel in-

Rule of 65 benefits under the agreement arose when employees, after attaining the requisite eligibility, experienced at least a two-year break in service as the result of a plant shutdown, involuntary layoff or absence due to physical disability. For the purposes of entitlement to these benefits, years of service included the first two years following a layoff. This method of calculation was known as the "creep." Under the creep, recall of a laid off employee for even one day commenced a new two-year continuous service period. *See* FF 20, 38. Under the 70/75 pension plan, an employee could creep into the necessary age and service requirement. Under the Rule of 65 plan, an employee could creep only into the age requirement. *See* FF 21-22.

In addition to the break-in-service pension benefits, USW and Continental in 1977 negotiated a change in the seniority system. Prior to the negotiations, the Pittsburgh plant had operated under a departmental seniority system.[9] In April of 1977, Continental officials had initiated meetings with USW officials to discuss the possibility of implementing plant-wide seniority[10] at the Pittsburgh plant. That summer, local union representatives at the Pittsburgh plant met with Continental officials to negotiate the plant-

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dustry's agreement from the USW. Although many of the details of the Rule of 65 plan were unavailable, Continental was aware that it involved a twenty-year service requirement and that payments thereunder would be triggered in the event of a plant shutdown or extended involuntary layoff. *See* FF 80-83.

[9] Under departmental seniority, each department constitutes a separate unit within a plant. An employee's length of service in one department under this system has no bearing on his or her competitive seniority in another department. As a result, under departmental seniority employees with greater seniority could be laid off in one department while employees with fewer years of service were retained in another. *See* FF 71.

[10] Under plant-wide seniority, an employee with greater seniority has work priority over any employee throughout the plant who has less seniority. *See* FF 72.

wide seniority system. USW favored the change over to plant-wide seniority for two reasons: the departmental seniority system had elicited charges of discrimination by the Equal Employment Opportunity Commission (EEOC), and the plant-wide seniority system would provide maximum job security for its most senior employees. *See* FF 73. Continental favored plant-wide seniority because it would enable the company (1) to retain its most senior and skilled employees; (2) to retain employees with vested 70/75 and Rule of 65 pension benefits; and (3) to lay off junior employees whose benefits had not yet vested. *See* FF 74. Ultimately, on October 28, 1977, Continental and the local union formally agreed to institute a plant-wide seniority system at the Pittsburgh plant effective November 1, 1977. *See* FF 112-13, 118, 122.

A. The "Liability Avoidance" Program

In the mid-1970s, Continental began experiencing a steady decline in business. This decline was principally a result of new manufacturing processes that required fewer plants, the increasing use by the can industry of composite materials and aluminum instead of steel to produce cans, and a growing trend among Continental's customers to begin to manufacture their own cans. *See* FF 31-32. Continental, as part of an effort to control and reduce its anticipated costs in light of its declining business,[11] in 1976 devised a "liability avoidance" program.[12] In order to im-

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[11] In 1972 and again in 1976, Continental created reserve funds to cover its anticipated costs (including employee benefits such as continued insurance coverage, supplemental unemployment benefits and 70/75 pensions) in the event, *inter alia*, of a plant shutdown. The 1972 reserve—the Extra Charge Authorization ("ECA")—consisted of $231 million at the time of creation. By 1976, however, the ECA had been substantially consumed. The 1976 reserve—the Plant Utilization Program ("PUP")—was established in an amount in excess of $100 million. *See* FF 43-45.

[12] Continental so labeled the program in its internal memoranda. *See* FF 68.

plement effectively this program, Continental developed an intricate system called the Bell System. The concept component of the Bell System, Bell I, had two complementary objectives: to identify Continental's unfunded pension liabilities so as to avoid triggering future vesting by placing employees who had not yet become eligible for break-in-service on layoff, and to retain those employees whose benefits had already vested. *See* FF 53, 59, 68.

Under Bell I, Continental developed a "cap and shrink" program. It defined a "cap" as a workforce reduction designed to reduce unfunded liabilities; a "shrink" was a workforce reduction resulting from market or manufacturing conditions. *See* FF 54. The decision whether to cap a particular plant was made on the basis of a variety of economic factors at the plant, including its potential employee benefits costs. The determination of an actual cap level was based on Continental's assessment of the needed level of production to meet projected sales.[13] The cap-line limited employment to a specific name on the seniority roster[14] and was effective for five years. Employees below the cap-line, whether then at work or on temporary layoff, were designated as "permanently laid off," and could not be recalled for five years[15] except under extreme circumstances, and then only with prior approval from the high-

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[13] Prior to the institution of the cap program, the employment level was based on projections of the required manpower needed to produce anticipated volumes of Continental products. After the cap program was adopted, the volume of business was tailored to meet the predetermined desired level of employment. *See* FF 60-61.

[14] The cap-line did not determine the actual number of employees working at a given point in time. As employees within the capped workforce died, quit or retired, the number of employees actually on the job decreased. Thus, the cap-line merely divided those employees eligible for work under the liability avoidance program from those designated as permanently laid off. *See* FF 66; Jt. App. 1074; 340-41.

[15] Under the USW contract, employees lost all rights to recall after five years.

est level of Continental's management. *See* FF 54-57. These employees were not informed by Continental that they would not be recalled.

To further effectuate the goals of the Bell System, Bell II instructed plant managers to adjust their business volume to the desired level of employment. In accordance with this plan, plant managers were authorized to shift business to plants that either had low unfunded pension liability or plants that needed the work in order to retain employees with vested 70/75 benefits. *See* FF 61, 63; Jt. App. at 1367. In addition, Bell II produced and employed scattergraphs—computerized charts that listed the age and service of Continental employees at a given time—to identify the unfunded 70/75 and Rule of 65 liabilities and to ascertain when payments under those plans would be triggered. By looking at a scattergraph, a plant manager could determine the number of USW employees whose rights for 70/75 and Rule of 65 benefits had already vested and those whose rights had not yet vested.[16] *See* FF 64.

Finally, in April of 1977, a "liability avoidance tracking system"—the "Red Flag" System—was instituted in order to prevent inadvertent recalls of employees designated as permanently laid off. Red Flag was tied to Continental's payroll system and was designed to generate automatically a red flag report to alert top Continental officials whenever a permanently laid off employee received a pay check either for actual hours worked or vacation. *See* FF 69-70.

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[16] The Inter Plan Job Opportunities ("IPJP") potentially complicated the plant managers' determination of which employees were in the vested or non-vested categories. Under the collective bargaining agreement, USW employees laid off from one plant could transfer to another plant where they had preferential hiring rights. Thus, an employee on permanent layoff status at one plant could in fact continue working in another plant. The requirement that an employee permanently laid off not be recalled for five years, however, directly coincided with the five-year limitation on an employee's preferential recall rights under the collective bargaining agreement. *See* FF 67.

B. The Pittsburgh Plant and the Closing of the Pail Line

Like Continental's overall situation, the Pittsburgh plant experienced a significant decline in business in the mid-1970s. As a result, a number of the plant's production lines were closed, and, in 1975, the Pittsburgh plant became a service center, producing parts for other plants, instead of a factory that made and assembled the entire can. Pittsburgh's pail line, which manufactured large gallon steel containers, however, remained in operation. In 1975, the pail line was designated as a separate plant in order to determine its profitability. Despite the separate designation, the Pittsburgh plant and the pail line continued to share a seniority roster. *See* FF 91-93.

Sometime in 1976, the Pittsburgh plant was selected, in part because of its potentially high unfunded liability costs, as a "concept development" plant for implementing Continental's liability avoidance program. *See* FF 62; Jt. App. 1385. In June of 1976, Continental's Executive Vice President and General Manager of Continental Can Company, USA, Donald Bainton, approved a cap for the Pittsburgh plant of 574 USW employees, to be achieved by the end of 1976, and a second cap of 417 USW employees, to be achieved by the end of 1977. Subsequently, in January of 1977, a Continental official indicated that the "ideal cap level" for the Pittsburgh plant, "disregarding volume assumptions and other factors except long range people liability costs," i.e., unfunded pension liabilities, was 392 USW employees as opposed to the previous recommendation of 417 USW employees. *See* Jt. App. 1250. A cap was not set for employees represented by the other two unions at the Pittsburgh plant.

In early 1977, the manager of the pail line recommended moving the operation to a new location in order to increase its profitability. By the summer of 1977, Continental officials had decided to close the pail line. *See* FF 105. This

decision was based in part on Continental's desire to prevent employees from attaining eligibility for 70/75 and Rule of 65 benefits. Continental also considered the pail line's unprofitability at the Pittsburgh location in determining that it should be closed. *See* FF 101-02, 105-07.

In the summer of 1977, Continental informed the USW and the Pittsburgh local union representatives of its decision to close the pail line. During this time Continental was also pursuing an agreement to implement a plant-wide seniority system at the Pittsburgh plant. In exchange for Continental's promise to use its best efforts to retain employees with twenty years or more of service, the local union agreed to plant-wide seniority. Thereafter, a twenty-year cap-line was drawn under the name of Francis Conti. The 417 USW employee cap for 1978 was increased to 472, which included 436 USW employees above Conti or the twenty-year cap-line, and 36 skilled employees below the cap-line. *See* FF 117-122. The pail line was closed after Continental and the union formally agreed to implement plant-wide seniority, resulting in the elimination of one-hundred and eleven jobs. *See* FF 132-133.

II.
PROCEDURAL HISTORY

In the proceedings before the district court, the appellants, all of whom were permanently laid off from the Pittsburgh plant between January 1976 and May 1978,[17]

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[17] As to the lead plaintiffs in the consolidated actions, the district court found that Robert Gavalik was laid off on January 1, 1978, at which time he was forty years old and had nineteen years and seven months of service; Albert Jakub was laid off on December 22, 1977, at which time he was forty-four years old and had nineteen years and seven months of service with Continental. In addition, the district court found age and service at the time of layoff for the following plaintiffs: Francis Humenik, age forty-one, two weeks short of attaining twenty-year service; Thomas Riley, age thirty-nine and sixteen days short of attaining twenty-year service; and Anthony Folino, age forty-four, eighteen years and eight months of service. *See* FF 136-140.

challenged both Continental's adoption and implementation of its liability avoidance program at the Pittsburgh plant and its closure of the pail line at the Pittsburgh plant. The *Gavalik* action alleged, *inter alia*, that the closure of the pail line was designed to prevent class members from achieving eligibility for 70/75 and Rule of 65 pension benefits in violation of § 510 of ERISA. Discovery in *Gavalik* brought to light the liability avoidance program, and the subsequent *Jakub* complaint challenged the adoption and implementation of the overall liability avoidance program as a deliberate effort to manipulate plaintiffs' length of employment in order to deprive them of 70/75 and Rule of 65 pension benefits, all in violation of § 510.

After a bench trial, the district court entered an order granting judgment for Continental. In its accompanying, extensive findings of facts, the court found that Continental's liability avoidance program was adopted and implemented in order to avoid future vesting of break-in-service pension benefits. *See* FF 53, 68. The court further found that the subsequent decision by Continental to cap the Pittsburgh plant, which resulted in the layoff of individual and class plaintiffs, and its decision to close the pail line, were motivated in part by the desire to prevent employees from attaining eligibility for 70/75 and Rule of 65 benefits and in part by the declining business conditions at the Pittsburgh plant. *See* FF 106-07, 141-42. The district court concluded, without explanation, that Continental's actions did not violate § 510 of ERISA. *See* Conclusions of Law ("CL") 4-5.

On appeal, appellants allege that the district court erred in concluding that its own findings of fact did not establish a classwide violation of § 510 of ERISA; that the court erroneously remitted the determination of whether individual class members' layoffs were caused by the liability avoidance program to the liability phase of the bifurcated trial; that, in any event, having found that appellants' layoffs were the consequence of mixed motives, the court

erred in its allocation of the "but for" burden of proof; and that the critical findings of the district court were clearly erroneous. Continental has cross-appealed alleging that appellants' action before the district court was barred (1) by a two-year statute of limitations or, alternatively, a six-month limitations period, and (2) for failure to exhaust grievance and arbitration procedures. We shall address the cross-appeal first.

III.
THE CROSS-APPEAL

A. Statute of Limitations

1.

Continental advances several arguments that, it maintains, require application of a shorter period of limitations than applied by the district court. First, Continental argues that subsequent judicial developments require that a two-year statute of limitations be applied to appellants' claims. Alternatively, Continental urges the application of a six-month limitation period pursuant to the Supreme Court's decision in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

Section 510 of ERISA, 29 U.S.C. § 1140 (1982), and the applicable enforcement provision, 29 U.S.C. § 1132 (1982), do not provide a specific statute of limitations for actions alleging violations of § 510. Under such circumstances, the appropriate period is determined by reference to the state statute of limitations governing cases most analogous to the cause of action asserted by the plaintiffs. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 & n.12 (1985). The district court determined that appellants' allegation of a § 510 violation was most analogous to a claim of employment discrimination or breach of fiduciary duty, and that on either theory the six-year residuary period of limitations set forth in 42 Pa. Cons. Stat Ann. § 5527(6)

(Purdon 1982) was applicable. Continental does not challenge on appeal the district court's determination that appellants' § 510 action is analogous to an employment discrimination action.[18] Instead, Continental, accepting the district court's determination is correct, argues that the applicable limitation period is nonetheless two years. We reject Continental's contention.

Continental seeks to discredit the district court's determination that a six-year statute of limitations applies to the instant action because it specifically relied on this Court's decision in *Knoll v. Springfield Township School District*, 699 F.2d 137 (3d Cir. 1983), *cert. granted*, 468 U.S. 1204 (1984) ("*Knoll I*"), which was subsequently vacated by the Supreme Court in light of its decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), *see Springfield Township School District v. Knoll*, 471 U.S. 288 (1985) (per curiam), and modified by this Court. *See Knoll v. Springfield Township School District*, 763 F.2d 584 (3d Cir. 1985) ("*Knoll II*"). This Court's modification in *Knoll II*, however, did not effect a change in Pennsylvania law, under which state law claims analogous to employment discrimination and wrongful discharge claims are governed by a six-year limitation period. *See, e.g, Skehan v. Bloomsburg State College*, 503 A.2d 1000 (Pa. Commw. 1986) (applying six-year statute of limitations to plaintiff's employment discrimination claim); *see also Ulloa v. City of Philadelphia*, 95 F.R.D. 109, 114 (E.D. Pa. 1982) (collecting cases).

In *Wilson v. Garcia*, the Supreme Court considered the question "whether all § 1983 claims should be characterized in the same way for limitations purposes." 471 U.S.

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[18] Continental did argue before the district court that appellants' action was more analogous to an action for intentional interference with contractual relations and therefore was subject to a two-year limitation period. This claim was rejected by the district court. *See* Jt. App. at 171.

at 271. Upon analysis of the legislative history and statutory goals of § 1983, the Court concluded that a uniform time limit for *all* § 1983 actions—regardless of the nature of the precise claim—must be applied in each state. *Id.* at 275. The Court further concluded that § 1983 actions are best characterized as personal injury actions for limitations purposes. *Id.* at 276.

Notwithstanding the *Garcia* Court's repeated references to the particular purposes of § 1983, Continental argues that, in effect, the holding in *Garcia* established that all claims analogous to a charge of employment discrimination must be governed by the state's statute of limitations period for personal injury. We disagree. Indeed, the facts of *Garcia* itself simply belie Continental's contention. In the underlying action in *Garcia*, respondent sought damages for an alleged unlawful arrest and brutality of the arresting officer. In reaching its conclusion that § 1983 actions should be governed by state personal injury limitations periods, the court made no determination that the individual claims themselves were always most closely analogous to personal injury claims. Indeed, the court recognized that "the § 1983 remedy encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty," but concluded that

> [t]he unifying theme of the Civil Rights Act of 1871 is reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every "*person*" subject to the jurisdiction of any of the *several States. The Constitution's command is that all "persons"* shall be accorded the full privileges of citizenship; no "*person*" shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws. A violation of that command is an injury to the individual rights of the person.

Garcia, 471 U.S. at 277 (emphasis in original).[19]

On remand and in accordance with *Garcia*, we followed the Supreme Court's "bright-line approach to the problem of determining what statute of limitations should be applied in § 1983 actions," *Knoll II*, 763 F.2d at 585, and held that in Pennsylvania the two-year statute of limitations for personal injury actions must govern all § 1983 actions despite the topical nature of the claim. *Id.* Neither *Garcia* nor this Court's decision in *Knoll II* render the district court's determination that appellant's § 510 action most closely resembles an employment discrimination claim erroneous. Nor do they affect this Court's consistent rulings that employment discrimination or wrongful discharge claims brought under federal law are governed by Pennsylvania's six-year residuary clause. *See Fitzgerald v. Larson*, 741 F.2d 32, 35 (3d Cir. 1984), *vacated*, ___ U.S. ___, 105 S. Ct. 2108 (1985); *Perri v. Aytch*, 724 F.2d 362, 368 (3d Cir. 1983); *Knoll I*, 699 F.2d at 145.[20] *Cf. Al-Khazraji*

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[19] Moreover, in vacating this Court's decision in *Knoll I*, the Supreme Court remanded the appeal to us in light of its holding in *Garcia* that "all § 1983 claims should be characterized for statute of limitations purposes as actions to recover damages for injuries to the person." *Springfield Township School Dist. v. Knoll*, 471 U.S. 288 (1985) (emphasis added).

[20] We recognize that the cases cited for the proposition that federal actions brought in Pennsylvania alleging employment discrimination or wrongful discharge are governed by a six-year limitation period predate the Supreme Court's decision in *Garcia*. We emphasize, however, that *Garcia* did not affect the underlying characterization of "the essential nature of the federal claim within the scheme created by the various state statutes of limitation." *Davis v. United States Steel Supply*, 581 F.2d 335, 337 (3d Cir. 1978), *resubmitted*, 688 F.2d 166 (3d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983). Rather, *Garcia* held that, regardless of that characterization, for purposes of § 1983, the state limitations period for personal injury claims would govern. *See also Knoll II*, 763 F.2d at 585 ("In *Wilson v. Garcia*, the Court held that even though constitutional claims alleged under § 1983 encompass numerous and diverse topics and subtopics, the state statute of limitations governing

v. Saint Francis College, 784 F.2d 505, 513 (3d Cir.), *cert. granted in part*, 107 S. Ct. 62 (1986) ("*Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), made it absolutely clear that the six-year limitations period for contract actions applied to Section 1981 actions brought to redress employment discrimination.") In sum, *Garcia* and *Knoll II* apply only to discrimination claims under § 1983.[21]

Continental argues that even if *Garcia* is not applicable to appellants' claim, this Court's decision in *Mazzanti v. Merck Co.*, 770 F.2d 34 (3d Cir. 1985) (per curiam) mandates application of a two-year statute of limitations. We find Continental's reasoning flawed and unpersuasive. *Mazzanti* involved a common law diversity action for tortious interference with an employment contract. As is typical

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tort actions for the recovery of damages for personal injuries provides the appropriate limitation period.") In effect, *Garcia* renders the initial characterization of a claim under § 1983 unnecessary. *Garcia* cannot be read, however, to eliminate the "settled practice," to which the Supreme Court refers in the course of its opinion, of adopting a local time limitation which governs state actions most analogous to the federal claim when Congress has failed to provide a specific time limitation. *Garcia*, 471 U.S. at 266; *cf. DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171 (1983) ("We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, [even where] . . . state law fails to provide a perfect analogy.")

[21] This court's decision in *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985), *cert. granted*, 55 U.S.L.W. 3391 (U.S. Dec. 2, 1986), highlights the limitation of *Garcia*. In *Goodman* we held that § 1981 actions alleging employment discrimination must, like § 1983 actions making the same type of claim, apply the same period of limitations, *viz.*, the two-year personal injury statute. In other words, *Goodman*, like *Garcia*, focused not on the nature of the particular claim, but rather on the historical basis unifying all § 1981 actions. 777 F.2d at 119-120. Moreover, noting the "substantial overlap" in claims brought under §§ 1981 and 1983, the *Goodman* Court concluded that, given the Supreme Court's decision in *Garcia*, application of different limitations periods "where the same claim is brought under § 1981 would lead to a bizarre result." *Id.* at 120.

in tortious interference case, the plaintiff in *Mazzanti* had filed a complaint against Merck & Company, a third party, alleging tortious interference with her employment contract with PHP Graphic Arts Corporation, which resulted in her termination by Graphic.[22] *Id.* In considering whether to apply Pennsylvania's two-year statute of limitations or its residual six-year statute to Mazzanti's claim, this Court, relying principally on a Pennsylvania Court of Common Pleas decision, *Home for Crippled Children v. Erie Insurance Exchange*, 130 P.L.J. 480 (Allegheny Cty., 1982), *aff'd mem.*, 329 Pa. Super. 610, 478 A.2d 84 (1984), predicted that the Supreme Court of Pennsylvania would apply the two-year statute. *See Mazzanti*, 770 F.2d at 36. *Home for Crippled Children*, in turn, based its judgment primarily on its determination that the plain language of 42 Pa. Cons. Stat. Ann. § 5524(3) (Purdon 1982) which prescribes a two-year limitation period for "taking, detaining or injuring personal property," encompassed tortious interference, since contract rights—even if intangible—are personal property under Pennsylvania law.

In the course of examining appellant's claim, the *Mazzanti* Court made reference to our prior decision in *Knoll I* and *Fitzgerald*, which applied Pennsylvania's six-year limitations period to plaintiffs' claims of employment discrimination. Noting the effect of *Wilson v. Garcia, supra*, on those decisions, the *Mazzanti* Court summarily noted "that *Garcia, Knoll* [*I*] and *Fitzgerald* all confronted the state limitations problem in the context of federal actions with unique federal policy concerns," and concluded that "those cases [are not] controlling in a diversity context." 770 F.2d at 36. Contrary to Continental's contention, we

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[22] A tortious interference with contract claim may only lie against a third party. *See Wells v. Thomas*, 569 F. Supp. 426, 435 (E.D. Pa. 1983) ("Pennsylvania law does not permit a terminated employee to assert against his or her employer a claim for intentional interference with his [or her] employment relationship; it is not a claim which can be made by the parties to a 'contract' against each other.").

see nothing in *Mazzanti* to suggest that *all* federal actions for discrimination are now subject to a two-year statute of limitations under Pennsylvania law. *Mazzanti* considered our prior decisions inapposite and therefore inapplicable to its facts not because of the substantive analysis employed to resolve the Pennsylvania limitations issue, but rather because of the unique federal context in which the analyses were made.[23] Thus, *Mazzanti* simply does not mandate a two-year limitations period for appellants' claims.

Appellants note that "most of the cases discussed and relied upon by both parties on the merits are employment discrimination cases under Title VII." Second Brief for Appellants Cross-Appellees at 41. In the course of various rulings, the district court repeatedly likened appellants' claims to an action alleging employment discrimination.[24] The gravamen of appellants' complaint, to paraphrase the district court, is that they were singled out for adverse treatment on the basis of their unvested pension eligibility. We do not deem the district court's determination to be in error. Accordingly, we find that the six-year limitation period was properly applied in this case.

2.

In *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), the Supreme Court considered what stat-

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[23] The *Mazzanti* court recognized that the implementation of the federal policy concerns that were at issue in *Knoll I* and *Fitzgerald* "has now been resolved by the United States Supreme Court [in *Garcia*] on a premise different from that which we employed in [those cases.]" 770 F.2d at 36. That premise, rejected in *Garcia*, *see* 471 U.S. at 273-75, was to treat "the particular [§ 1983] claim in suit on an ad hoc basis, focusing on 'the relief sought and the type of injury alleged.' " *Fitzgerald*, 741 F.2d at 35 (quoting *Aitchison v. Raffiani*, 708 F.2d 96, 101 (3d Cir. 1983)).

[24] Indeed, the characterization of the nature of appellants' claim is a key element underlying most of the issues in the instant cross-appeal.

ute of limitations should apply to suits alleging that the employer breached a provision of a collective bargaining agreement and that the union breached its duty of fair representation by mishandling the ensuing grievance or arbitration proceedings. The Court concluded that the six-month limitations period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), should govern the suit.[25] In choosing § 10(b), the Court noted:

> In some circumstances . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappro-

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[25] In the proceedings before the district court, Continental moved for dismissal urging application of the *DelCostello* six-month limitation period. The district court denied the motion, noting that because the *DelCostello* limitation "applied [only] to actions filed after binding arbitration, it is wholly inappropriate to this case." Jt. App. at 171. Our review of the case law in this Circuit, however, reveals no such limitation. *See, e.g, Martin v. Pullman Standard*, 726 F.2d 101 (3d Cir. 1984) (holding that *DelCostello* was applicable but remanding for determination whether statute of limitations was tolled until plaintiff was informed by union that his grievance had been withdrawn); *Scott v. Local 863, Int'l Bhd. of Teamsters*, 725 F.2d 226 (3d Cir. 1984) (applying *DelCostello* where union refused to proceed to arbitration); *Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1983) (applying *DelCostello* to claim that union breached its duty of fair representation by failing to carry his grievance to arbitration).

Indeed, in holding that the six-month limitations period of § 10(b), as opposed to state limitations periods for vacating an arbitration award, was applicable to DelCostello's claims, the Supreme Court observed that

> [a]pplication of an arbitration statute seems straightforward enough when a grievance has run its full course, culminating in a formal award by a neutral arbitrator. But the union's breach of duty may consist of a wrongful failure to pursue a grievance to arbitration . . . or a refusal to pursue it through even preliminary stages.

462 U.S. at 166 n.16. Thus, application of the six-month limitations period to situations in which no binding arbitration had occurred was specifically contemplated by the Court. *DelCostello* is nonetheless inapplicable to the instant action. *See* discussion *infra*.

> priate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.

462 U.S. at 161. Rather, resort to federal law may be appropriate "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking . . ." *Id.* at 172.

Three factors were essential to the *DelCostello* Court's determination that the six-month limitations period of § 10(b) of the NLRA should apply to a hybrid § 301/fair representation claim.[26] First, the Court noted that the hybrid § 301/fair representation claim "ha[d] no close analogy in ordinary state law," 462 U.S. at 165, but rather bore a "family resemblance" to charges of unfair labor practice under the NLRB. *Id.* at 170. Second, the Court considered the "rapid final resolution of labor disputes," *id.* at 168, essential to the maintenance of industrial peace. Finally, the Court recognized " '[t]he need for uniformity' " where " 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it [-are implicated].' " *DelCostello*, 462 U.S. at 171 (quoting *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 70 (1981) (Stewart, J. concurring in judgment)).

We do not think the policy considerations that animated the Court's adoption of the six-month limitations period in

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[26] Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), authorizes actions "for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185(a). The Supreme Court's decisions in *Vaca v. Sipes*, 386 U.S. 171 (1967), and *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), gave recognition to a joint cause of action against the employer for breach of contract and the union for breach of duty of fair representation under section 301.

DelCostello are present here. Unlike *DelCostello*, we have held *supra* that the district court's determination that appellants' claims most closely resemble an employment discrimination claim was not in error. In another context, yet on facts similar to those in the instant appeal, Judge Sarokin noted the similarity between § 510 ERISA actions and employment discrimination claims under Title VII:

> Just as Title VII does not guarantee employment, section 510 of ERISA does not guarantee pension benefits; similarly, as Title VII prohibits discrimination on the basis of race with respect to such employment, so does section 510 prohibit discrimination with respect to pension benefits on the basis of one's proximity to such benefits.

McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1503-04 (D.N.J. 1985).[27] We think the analogy is appropriate.

Moveover, the *DelCostello* Court emphasized that "federal courts should [not] eschew use of state limitations periods anytime state law fails to provide a *perfect* analogy." 462 U.S. at 171 (emphasis added). The Court recognized that "there is not always an obvious state-law choice for application to a given federal cause of action." *id.* Nevertheless, the Court concluded that "resort to state law remains the norm for borrowing of limitations periods." *Id.* Thus, only if "a rule from elsewhere in federal law *clearly* provides a closer analogy," *id.* at 172 (emphasis added), may we "turn away from state law." *Id.*

Continental suggests that § 10(b) of NLRA provides such an analogy. Examination of the remaining two factors con-

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[27] The *McLendon* plaintiffs assert claims virtually identical to appellants' claims in the instant action. Namely, they challenge both the Continental Group's 'capping program' and its failure to recall laid off employees as an effort to abort their eligibility for Rule of 65 and 70/75 pension benefits as violative of § 510 of ERISA. *See McLendon*, 602 F. Supp. at 1497.

sidered by the *DelCostello* Court, however, counsels otherwise. There can be no doubt that the "rapid final resolution of labor disputes [is] favored by federal law." 462 U.S. at 168. This Court has recently observed, however, that such speed and finality are most relevant where the disputed issue "is intertwined with the day-to-day relationship between management and labor." *Adams v. Gould Inc.*, 739 F.2d 858, 867 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985). *Adams* involved in ERISA breach of fiduciary duty claim against trustees of a pension plan. There, we found that the day-to-day working environment was unaffected where the dispute involved pension contributions, and thus the implication of delay in resolving such disputes did not justify application of the shorter limitations period. Similarly, in the instant action, the nature of appellants' claims, albeit serious, is not such that a delay in resolution threatens labor peace. Indeed, although appellants' claims are markedly different from the claim alleged in *Adams, see infra*, involving as they do pension plans and eligibility, here, as in *Adams*, "it [is] far more likely that employees will not be aware of their grievance immediately." *Id.* at 867.

Finally, *DelCostello's* concern with uniformity was informed both by the "similarity of the rights asserted" and the "similarity of the considerations relevant to the choice of a limitations period." *DelCostello*, 462 U.S. at 170-71. Continental argues, based on the language of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3),[28] that appellants' ERISA claims bear a "family resemblance" to unfair labor practice

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[28] Section 8(a)(3) provides:

> (a) It shall be an unfair labor practice for an employer—
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. § 158(a)(3) (1982).

claims alleging discrimination on the basis of union membership. Continental has provided this Court with no case law to assist in determining whether there exists a similarity in the rights asserted in § 8(a)(3) NLRB actions and § 510 ERISA actions. Assuming *arguendo*, however, that such similarity exists, we would nevertheless hold *DelCostello's* six-month limitations period inapplicable to this action because satisfaction of the second prong of the uniformity concern—similarity in the policy considerations relevant to the choice of a limitations period—is lacking.

In that regard, *DelCostello* held application of § 10(b) appropriate on its facts, finding that both hybrid § 301/fair representation actions and unfair labor practice claims must be considered in light of " 'the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system.' " *Id.* at 171 (quoting *Mitchell*, 451 U.S. at 71 (Stewart, J., concurring in judgment)). As we noted above, the instant dispute, unlike that contemplated in *DelCostello*, does not threaten to destabilize the bargaining relationship in the manner contemplated by *DelCostello* because here the day-to-day relationship between labor and management is not affected. *See supra*. Moreover, and more important, the desirability of a uniform national limitations period exists where the claims asserted arise under a collective bargaining agreement. Under these circumstances, uniformity operates to preserve " 'the grievance machinery under a collective bargaining agreement [that] is at the very heart of the system of industrial self-government.' " 462 U.S. at 168 (quoting *Mitchell*, 451 U.S. at 63).

In the instant action, Section 7.1(a) of the Pension Agreement between the USW and Continental provides:

> If, during the term of this Agreement, any differences shall arise between the Company and any Employee

> who shall be an applicant for a lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such Employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences . . . may be taken up as a grievance . . .

Jt. App. at 1930. In ruling on Continental's motion to dismiss for failure to exhaust grievance procedures, the district court had occasion to consider the nature of appellants' claim and whether that claim was covered under the Pension Agreement. The court stated: "[W]e do not believe that the plaintiffs' claim falls within the terms of the [Pension Agreement] . . . since they are . . . neither applicants for a pension nor in dispute with the defendant as to whether or not they are entitled to a pension. The plaintiffs' claim is not that they have been denied their pensions, but that they have been denied the opportunity to eventually become entitled to a pension." Jt. App. at 165. We agree with the district court's characterization of appellants' claims and its conclusion that such claims are not encompassed under the terms of the Pension Agreement. *Cf. Amaro v. Continental Can Co.*, 724 F.2d 747, 749 (9th Cir. 1984) ("This statutory claim [under § 510 of ERISA] is not for benefits under a collective bargaining agreement. The employees, in fact, are not yet eligible for those benefits.") Thus, appellants' § 510 discrimination claim does not implicate the concerns that persuaded the *DelCostello* Court to apply § 10(b) to hybrid § 301/fair representation claims.

In sum, *DelCostello* does not mandate application of the six-month limitation period of § 10(b) of the NLRB in this case where (1) an adequate state analogy exists and affords a limitations period that does not frustrate national policy, (2) the policies underlying adoption of the six-month limitations period are not present, and (3) no alternative federal limitations period has been suggested to this Court.

Accordingly, *DelCostello* is inapplicable and Pennsylvania law governs.

B. Exhaustion of Remedies

Subsequent to oral argument in this case, another panel of this Court held that "an employee with a claim under Section 510 of ERISA need not submit that claim to the plan before seeking relief in a federal district court." *Zipf v. American Telephone and Telegraph Co.*, ("AT&T"), 799 F.2d 889, 893 (3d Cir. 1986). *Zipf* clearly controls the resolution of Continental's exhaustion claim.

In *Zipf*, appellant suffered from rheumatoid arthritis which caused her to take a disability leave of absence from her employment. After Zipf returned to full-time status, she continued occasionally to miss work due to her illness. Eventually, her condition worsened and she began another period of disability leave. On the seventh day of absence Zipf was informed by her supervisor of the company's decision to terminate her because of her " 'excessive absenteeism.' " *Zipf*, 799 F.2d at 890. Zipf filed suit alleging that the decision to terminate was made in violation of § 510 of ERISA to prevent her from potentially qualifying for substantial benefits for which she would have become eligible on her eighth day of absence from work. Summary judgment was entered for AT&T and Zipf's suit was dismissed for failure to exhaust internal administrative remedies.

Upon review, this Court identified two distinct exhaustion issues: (1) whether before seeking judicial relief on a § 510 claim, a claimant is required to submit that claim to the plan and (2) "whether [a § 510 claimant], before seeking judicial relief . . ., must submit to the plan the question of whether [s/he] would have been eligible for benefits had [s/he] not been discharged." 799 F.2d at 891. Proceeding to examine the law of this Circuit, the *Zipf* Court found our prior decision in *Wolf v. National Shopmen*, 728 F.2d 182 (3d Cir. 1984), inapplicable to actions

"brought not to enforce the terms of a plan, but to assert rights granted by the federal statute." *Zipf*, 799 F.2d at 891. This Court then rejected the argument, also advanced in the instant appeal, *see* Reply Brief of Cross-Appellant at 21-24,[29] that ERISA contains an implied exhaustion requirement even as to substantive rights conferred under the statute. Examining the legislative history of the Act, we concluded that "the remedy for Section 510 discrimination was intended to be provided by the courts." *Zipf*, 799 F.2d at 892. Finally, *Zipf* recognized the strong national policy favoring arbitration and the traditional practice of the courts to defer to administrative expertise. Relying on this Court's decision in *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1985), the *Zipf* Court concluded that these considerations supported the balance struck in *Barrowclough*, to wit:

> the most reasonable accommodation is to hold that claims to establish or enforce rights to benefits under 29 U.S.C. § 1132(a) that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration, . . . while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate.

Zipf, 799 F.2d at 892 (quoting *Barrowclough*) (citations omitted).

Standing alone, *Zipf* ineluctably leads to the conclusion that appellants were not required to exhaust arbitral rem-

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[29] Indeed, Continental's argument goes further. Continental maintains that "ERISA *requires* that there be internal review procedures to handle claims under the pension plan." Reply Brief of Cross-Appellant at 21 (emphasis in original). Continental fails to distinguish between contractual rights protected under the Act and substantive rights conferred by the Act. *See DelGrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, ___U.S. ___, 106 S. Ct. 2246 (1986) (interpreting *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1985)).

edies. Continental argues, however, that *Zipf* must be read in light of our prior decision in *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986). Indeed, Continental contends that "attempted application of the principles articulated in *Zipf*," would put this Court at odds with recent Supreme Court precedent and create a direct conflict with *Jacobson*. Letter of Eugene L. Stewart, Attorney for Continental Can at 3 (Sept. 10, 1986). Rather than apply, *Zipf*, Continental urges that "[t]he correct approach to the exhaustion issue has been articulated by the . . . Supreme Court in *Mitsubishi* [*Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ___U.S. ___, 105 S. Ct. 3346 (1985),] and followed by this court in *Jacobson*." *Id.* at 5. Continental's argument does not alter the result.[30]

In *Mitsubishi*, the Supreme Court rejected the claim that an "arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate." 105 S. Ct. at 3353. Thus, no presumption against arbitrability arises when the right involved is statutory as opposed to contractual. The proper approach in considering issues of arbitrability, the Court instructed, is two-fold: First, the court must determine whether the parties' agreement to arbitrate encompasses the statutory issues, and second, if so, "whether legal constraints external to the parties' agreement foreclose[ ] the arbitration of those claims." *Id.* at 3355.

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[30] Continental points to Judge Adam's separate opinion in *Jacobson* for the proposition that *Zipf's* reliance on *Barrowclough*, in light of *Mitsubishi*, cannot be sustained. *See* Letter of Eugene Stewart at 2-4 (Sept. 10, 1986). In *Jacobson*, Judge Adams stated: "*Mitsubishi* spurned the basis proffered for this Court's decision in *Barrowclough*, stating that 'we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.' " *Jacobson*, 797 F.2d at 1209 (Adams, J. concurring in part, dissenting in part) (citations omitted). The issue of *Barrowclough's* continued vitality, of course,is not before this Court. *Mitsubishi's* rejection of a rule of nonarbitrability of statutory claims, however, does not undercut the independent interpretation of Section 510 in *Zipf*.

In *Zipf* the approach approved in *Mitsubishi* was not contravened. The *Zipf* Court did not resort to a presumption of unarbitrability, but rather sought to ascertain Congressional intent on the question of the arbitrability of substantive discrimination claims under § 510 of ERISA. Its examination of the legislative intent of § 510 revealed an express desire that claims brought thereunder be submitted to the courts. "Indeed, an amendment that would have created an administrative remedy for Section 510 claims, to be established by the Department of Labor, was defeated." *Zipf*, 799 F.2d at 892. *Jacobson*, which held that determining arbitrability of federal statutory claims is, after *Mitsubishi*, "a matter of statutory interpretation" and may not be determined "on the basis of some judicially recognized public policy," *Jacobson*, 797 F.2d at 1202, is thus fully consistent with the reasoning and holding in *Zipf*.

IV.
THE APPEAL

We now proceed to the merits of appellants' claims. Our standard of review of issues involving the interpretation and application of legal precepts is plenary. *United States v. Adams*, 759 F.2d 1099, 1106 (3d Cir.), *cert.denied*, ___ U.S. ___, 106 S. Ct. 275, 336 (1985). The trial court's findings of fact are governed by the clearly erroneous standard of review, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985), "but as to the legal component of its conclusion, this court has plenary review." *United States v. Felton*, 753 F.2d 276, 278 (3d Cir. 1985).

Appellants' contentions may be summarized as follows: (1) the district court erred in its conclusion that a classwide violation of ERISA had not been established; (2) the district court erred in requiring appellants to prove during the liability proceedings that their layoffs were caused by Continental's liability avoidance program, and by depriving appellants of a rebuttable presumption on causation; (3)

assuming *arguendo* that causation was properly at issue during the liability phase and that the burden of proof on that issue lay with appellants, they carried their burden by establishing that Continental's critical decisions were motivated both by permissible and impermissible factors, and the district court erred thereafter in placing the additional burden on the appellants to prove that, "but for" Continental's consideration of impermissible factors, they would have retained their jobs; and (4) finally, appellants independently argue the the critical factual findings of the district court were clearly erroneous.

These claims require us to consider complex questions concerning both the elements of proof of a § 510 ERISA discrimination claim and the allocation of the burdens of proof on trial of such claim. Any analysis of these issues must begin with an understanding of the nature of the claims asserted by the appellant class and the purposes of the statute under which these claims are brought.

A.

Section 510 of ERISA prohibits employer conduct taken against an employee who participates in a pension benefit plan for "the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140 (1982). Congress enacted § 510 primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights."[31] *West*

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[31] Section 510 represents but one provision designed to ensure pension security for the working class. Referring to the overall goals of the ERISA legislation, Senator Javits noted:

> Mr. President, a pension-reform law is now a reality because of the hardship, deprivation and inequity suffered by American working people. It is their collective anger and disgust that put tremendous congressional majorities behind [this legislation], and if we who espoused their cause in this body have sometimes not

v. Butler, 621 F.2d 240, 245 (6th Cir. 1980); *see also Zipf v. American Telephone & Telegraph Co.*, 799 F.2d at 889, 891 (1986) (citing *Butler*); *Donahue v. Custom Management Corp.*, 634 F. Supp. 1190, 1197 (W.D. Pa. 1986) (quoting *Butler*). To recover under § 510, a plaintiff need not prove that "the *sole* reason for his [or her] termination was to interfere with pension rights." *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff'd*, 742 F.2d 1441 (2d Cir. 1983) (emphasis in original). A plaintiff must, however, demonstrate that the defendant had the " 'specific intent' to violate ERISA." *Watkinson v. Great Atlantic & Pacific Tea Co., Inc.*, 585 F. Supp. 879, 883 (E.D.Pa. 1984) (quoting *Titsch*, supra). Proof of incidental loss of benefits as a result of a termination will not constitute a violation of § 510. *See Titsch*, 548 F. Supp. at 985 ("No ERISA cause of action [under § 510] lies where the loss of . . . benefits [i]s a mere consequence of, but not a motivating factor behind, a termination of employment.").

Under the prevailing case law, and in accordance with the statutory language, the essential element of proof under § 510 is specific intent to engage in proscribed activity. Proof of specific intent to interfere with the attainment of pension eligibility, then, "regardless of whether the interference is successful and regardless of whether the par-

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behaved in as gentlemanly a manner as is customary—and I hope those aberrations of conduct have been rare—it is because we too shared their sense of indignation and frustration over what often seemed to be a cynical disregard of fundamental American concepts of fairness and decency by some of those who managed the private pension funds.

The agony of years of frustrated and disappointed beneficiaries has now come to an end. The discipline of law will enable this and succeeding generations of workers to face their retirement period with greater confidence and greater security. . . .

3 *Legislative History of the Employee Retirement Income and Security Act of 1974*, at 4751 (1976) (remarks of Senator Javits).

ticipant would actually have received the benefits absent the interference," *Zipf*, 799 F.2d at 893, will ordinarily constitute a violation of § 510 of ERISA.[32] In most cases, however, specific intent to discriminate will not be demonstrated by "smoking gun" evidence. As a result, the evidentiary burden in discrimination cases may also be satisfied by the introduction of circumstantial evidence. *See Maxfield v. Sinclair Int'l*, 766 F.2d 788, 791 (3d Cir. 1985) *cert. denied*, ___ U.S. ___, 106 S. Ct. 796 (1986) (age discrimination). In the latter circumstance courts have developed "formula[s] . . . that enable[] the trial judge to sift through the evidence in an orderly fashion to determine the ultimate question in the case—did the defendant intentionally discriminate against the plaintiff[s]." *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984).

B.

As in the context of employment discrimination claims under Title VII, employees alleging discrimination under ERISA bear the burden of making out a *prima facie* case of discrimination. *See McDonnell Douglas Corp. v. Green*,

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[32] *Zipf's* construction of § 510 is supported by the legislative history which envisions preventive, as well as corrective, purposes of the provision. *See* S. Rep. No. 127, 93rd Cong., 1st Sess. 35 (1973), *reprinted in 1 Legislative History of the Employee Retirement Income and Security Act of 1974*, at 621 (1976) ("The enforcement provisions have been designed specifically to provide . . . participants and beneficiaries with broad remedies for redressing or preventing violations [of ERISA]"); *id.* at 622 ("the committee has concluded that safeguards are required to preclude this type of abuse from being carried out"); *see also 3 Legislative History of the Employee Retirement Income and Security Act of 1974*, at 4745 (1976) ("a further protection for employees is the prohibition against discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with attainment of vested benefits") (Senate floor debate on conference report on H. R. 2). Continental does not contest this construction; rather it maintains that "the district court's holding is in accordance with *Zipf*." Letter of James D. Morton at 2 (Sept. 11, 1986).

411 U.S. 792, 802 (1973); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) (refining *McDonnell Douglas*). To establish a *prima facie* case under ERISA § 510, an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. 29 U.S.C. § 1140 (1982). In a class action context, it is not enough for the class representative to prove the validity only of his or her own claim. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 (1982). Rather, the class representative "must establish that discrimination was the employer's standard practice." *Dillon*, 746 F.2d at 1004; *see also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (class representative must establish that (discrimination was the company's standard operating procedure') (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)). The burden of persuasion on the ultimate issue of intentional discrimination "remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.[33]

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[33] At least two circuits have held that the *Burdine* allocation of proof by which the ultimate burden of persuasion remains at all times with the plaintiff is inapplicable in a class action context. *See Taylor v. Teletype Corp.*, 648 F.2d 1129, 1137 n.18 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981) (*Burdine* does not affect a case of classwide discrimination where the evidence exposes the employer as "a proven wrongdoer" and creates a presumption—"unless the employer proves otherwise—that any class member was a victim of that policy"); *Vuyanich v. Republic Nat'l Bank*, 521 F. Supp. 656, 661 (N.D. Tex. 1981) ("*Burdine* is limited by the factual context in which it was decided.") *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984); *cf. Johnson v. Uncle Ben's*, 657 F.2d 750 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982) (*Burdine* allocation of proof inapplicable in Title VII disparate impact cases). In each of these cases, the plaintiffs had raised challenges to employment practices based on their discriminatory impact. In deciding that *Burdine*, which was an individual disparate treatment case, did not apply to the claims before them, those courts found significant the absence of an intent requirement in impact cases. The instant action is distinguishable in that proof of specific intent to dis-

If the class establishes a *prima facie* case by a preponderance of the evidence, the burden of production shifts to the employer to introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged actions. *See Burdine*, 450 U.S. at 254; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 & n.46 (1977); *Dillon*, 746 F.2d at 1004. If the employer fails to rebut the presumption of discrimination that arises from the class's *prima facie* case, the district court must enter judgment for the class. *See Teamsters*, 431 U.S. at 361. If, however, the employer carries its burden of production, the presumption drops from the case and the class representative is afforded the opportunity to demonstrate that the employer's articulated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256; *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179-80 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1244 (1986); *Dillon*, 746 F.2d at 1003-04; *see also Ursic v. Bethlehem Mines*, 556 F. Supp. 571 (W.D. Pa.), *aff'd in part*, 719 F.2d 670 (3d Cir. 1983) (employing a *Burdine*-like analysis to an ERISA § 510 claim).

Where the plaintiffs' case does consist of *direct* "smoking gun" evidence that the employer acted with discriminatory motivation, however, the Supreme Court has indicated that the *McDonnell Douglas-Burdine* shifting burdens mechanism is inapplicable. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *see also Goodman v. Lukens Steel Co.*, 777 F.2d 113, 130 (3d Cir. 1985) ("The presumptions and shifting burdens are merely an aid—not ends in themselves. When direct evidence is available,

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criminate is required. Moreover, this Court, in a nonclass action context, has rejected the intent/impact distinction as requiring different burdens. *See NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1333-34 (3d Cir. 1981).

problems of proof are no different than in other civil cases.") (citing *Trans World Airlines, supra; United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711 (1983); *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577 (1978)), *cert. granted,* 55 U.S.L.W. 3391 (U.S. Dec. 2, 1986) (No. 85-1625); *Dillon,* 746 F.2d at 1005 ("Once the plaintiff establishes liability the sine qua non for the [*McDonnell Douglas*] formula no longer exists."); *Bell v. Birmingham Linen Serv.,* 715 F.2d 1552, 1556 (11th Cir. 1983), *cert. denied,* 467 U.S. 1204 (1984) ("*McDonnell Douglas* . . . pertains primarily . . . to situations where direct evidence of discrimination is lacking"); *cf. Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702 (1978) (policy requiring larger contribution to pension fund from women than from men was discriminatory on its face); *EEOC v. Wyoming Retirement System,* 771 F.2d 1425, 1430 (10th Cir. 1985) (direct evidence of discrimination codified in retirement statute). Guided by these general principles, we turn to appellants' class claims of discrimination under ERISA.

C.

In the proceedings before the district court, "[p]laintiffs . . . assert[ed] that . . . [Continental] deliberately followed a plan for avoiding pension liability as a means of increasing its profits, not that it deliberately increased plant profitability by a means that happened to effect [sic] employees' eligibility for pension benefits." Jt. App. 170. The appellants thus raised a cognizable claim under § 510 which requires that loss of benefits be more than a "mere consequence" of employer conduct. *Titsh,* 548 F.Supp. at 985. Appellants maintained that Continental, in accordance with the alleged discriminatory plan, improperly (1) "capped" the Pittsburgh plant, (2) closed the pail line and (3) laid off members of the employee class, all in violation of § 510 of ERISA. *See* Jt. App. at 31-36. The district court found that the liability avoidance plan was designed to "avoid triggering future vesting." FF 53. Moreover, the court found that all three actions allegedly taken pursuant

to that plan were motivated in part by Continental's desire to prevent appellants from attaining pension eligibility. Nevertheless, the court concluded that none of the challenged actions established a classwide violation of § 510 and, accordingly, entered judgment for Continental. *See* CL 4-5.

Appellants argue that both the evidence adduced at trial and the findings of the district court establish that Continental violated § 510 by engaging in the challenged conduct for the purpose of interfering with appellants' attainment of pension eligibility for 70/75 and Rule of 65 benefits. Each of the acts that appellants claim was undertaken for proscribed purposes may independently make out a claim of discrimination under § 510. We shall first consider the liability avoidance program. Because the question whether the individually challenged actions of Continental—the layoffs, the capping of the Pittsburgh plant, and the closure of the pail line—constitute violations of the ERISA present similar procedural issues, those claims will be considered together in a separate section, *infra*.

1. Liability Avoidance Program

Appellants first maintain that the overall adoption and implementation of the "Bell System" in itself establishes a classwide violation of § 510 of ERISA. Although the district court made extensive findings of fact with regard to the elements of and the intent underlying the liability avoidance plan, it did not reach a conclusion as to whether these findings constituted a violation of ERISA. Our review of appellants' claim requires us to consider the proof requirements under the Act and to determine whether the evidence adduced at trial satisfies the elements of a § 510 claim.

The central features of Continental's Bell System, as established by the district court's findings, are as follows: (1) to identify Continental's "unfunded pension liabilities," i.e. employees who have not yet attained the required age

and service to qualify for 70/75 and Rule of 65 benefits, *see* FF 53, 64; (2) to designate those employees as "permanently laid off," ineligible for recall absent exigent circumstances, and then only with prior approval of top Continental management, *see* FF 54-57; (3) to alert Continental management through a computerized "red flag" system whenever an employee designated as "permanently laid off" receives a pay check, FF 69-70; and (4) to adjust the level of production to a predetermined level of employment. *See* FF 61, 63. In addition, the district court found that "Continental often referred to the goals outlined in the Bell System as 'liability avoidance.' It had two aspects: (a) sheltering or keeping employed 70/75 qualified employees so that their employment was assured throughout their normal careers; and (b) preventing further employees from qualifying for 70/75 pensions." *See* FF 68.

At the outset, Continental disputes that the liability avoidance plan was implemented at the Pittsburgh plant, and it argues that adoption of the plan, without more, cannot support a finding of liability.[34] *See* Brief of Appel-

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[34] Continental also argues that the question whether the liability avoidance plan in itself violated ERISA was not before the district court. *See* Brief of Appellee-Cross Appellant at 15. The evidence proves otherwise. First, in Count III of the *Jakub* complaint, appellants' maintained at item 38 that "the Company secretly devised and implemented a 'liability avoidance' or 'cap program.' The goal of this program was to prevent employees at the West Mifflin plant from attaining eligibility for these break-in-service pensions by capping the work force." Jt. App. at 34. Item 45 of Count III asserted that "[b]y the conduct alleged above, the Company has discharged, suspended and discriminated against plaintiffs for the purpose of interfering with employees' attainment of rights under the Company's benefit plans, all in violation of Section 510 of ERISA, 29 U.S.C. 1140." *Id.* at 36. We think it is clear that appellants challenged the overall liability avoidance program and its requirement that non-vested employees be designated as permanently laid off as discriminatory conduct.

The district court, however, repeatedly thwarted these attempts to challenge the system as a whole, requiring instead proof of an act that

lee-Cross Appellant at 14. We reject both claims. First, Continental's contention that its liability avoidance plan was not implemented at Pittsburgh disregards the evidence and the findings of the district court. The district court

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actually interfered with appellants' eligibility as opposed to one taken for the purpose to do so.

During an exchange between the district court and counsel, appellants attempted to explain the gravamen of their complaint.

APPELLANTS: "[I]t is the defendants' action in laying them off, in selecting them for layoff and laying them off that is the subject of this claim.

. . .

We are not attempting to prove in this case,—Although it might very well be an independent violation, the Court will not be called upon to [decide] in this case that a failure to call back in some discriminatory fashion constitutes a violation of ERISA, although it well may. But that's not what this case is about. *This case is about the selection and designation for layoff of people.* Now as part and parcel of that proof, we have shown the Court and put in testimony that on April 1st, 1977, a red flag system was initiated; that although this system was put into place back then, it became finalized and was allowed to go into place . . . once they got their plant-wide seniority in the fall of '77. . . .

The point was that they put the designation on these people, permanent layoff, red flag was instituted to keep that permanent layoff, designation in place. . . ."

THE COURT: "I don't think it matters whether it is permanent or not. Either if they laid people off permanent or not permanent with the purpose being to prevent them from attaining their pension rights or whatever, it would be a violation of ERISA."

Jt. App. at 468-70 (emphasis added). Although the response of the district court is not an inaccurate statement of a cognizable claim under section 510, it implicitly fails to recognize the particular claim asserted by appellants that the implementation of the plan was itself a violation of ERISA.

found that such a plan—the Bell System—was indeed created by Continental, *see* FF 51-54, 68, that Pittsburgh was selected as one of the three 'concept development plants' for the implementation of the plan, *see* FF 62; Jt. App. at 1385, and that Continental was motivated in part by the stated objectives of the liability avoidance plan in making each of the challenged decisions that resulted in the layoffs of individual class members. *See* FF 106, 141.[35] Second, as to the claim that adoption alone is insufficient conduct to constitute a violation of ERISA, both Continental and the district court misperceive the breadth of § 510.[36] The following colloquy illustrates the point:

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[35] An internal memorandum of Continental dated July 11, 1977 further indicates that the system was in effect at the Pittsburgh facility. The memorandum included "the explanatory report of the bridge from Bell I to Bell II," and sought to "ensure the implementation and continued use of Bell II." Jt. App. at 1073.

[36] Both Continental and the district court misconstrued the nature of the act or conduct requirement of section 510 in a class action context. Continental maintains that "[t]o discriminate, there must be some act. The existence of an alleged plan, without more, does not affect a participant." Brief of Appellee-Cross Appellant at 14. Similarly, in response to appellants' contention that "the discriminat[ory act] is putting them in a class that precludes their working," the district court stated: "And I am telling you as a matter of law classifying doesn't do anything to them." Jt. App. at 624-25. In the district court's view, "[s]chemes are only relevant in a conspiracy. We are not involved with a conspiracy here. It doesn't matter what [Continental's] scheme was. It's what they did. It doesn't matter what they planned; it's what they did that counts." Jt. App. at 903.

In a class action context, however, the "scheme" or policy is exactly what is at issue. *See Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976); *see also General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157-59 (1982) (a classwide challenge must encompass more than one allegation of discriminatory treatment). Appellants did not seek to prove the mere existence of an abstract, dormant plan or policy. Rather, they sought to demonstrate that specific acts had been

APPELLANTS: "[T]he definition of the class says clearly people who were designated for layoff; and *the fact that they were designated for layoff then doesn't mean they had to be laid off* and then—"

THE COURT: "Yes, but the *act of designation doesn't deprive them of any ERISA rights.*"

APPELLANTS: "No, Your Honor. It does not."

THE COURT: "And the only—"

APPELLANTS: "*Well, it does discriminate against them.* I think labeling them—"

THE COURT: "But this is not a discrimination case. *This is an ERISA case, and no rights have been taken away from them until they are laid off; and so the designation really has no significance as far as a violation of ERIDA is concerned.*"

Jt. App. at 473-74 (emphasis added).

Section 510, however, unlike other anti-discrimination provisions, is designed to *prevent* injury to employees' protected rights, not simply to redress the injury after the goals of a discriminatory plan have been effectuated. *See Zipf*, 799 F.2d at 891. To be certain, the broad, remedial objectives of § 510 do not authorize sanctions merely for an employer's state of mind. There must be some act in furtherance of an employer's desire to interfere with an employee's rights to pension benefits. That act, however, need not achieve the employer's illicit goals. To keep the effects of discriminatory intent "in the air", so to speak, is part of § 510's *raison d'etre*. The statute prohibits spec-

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taken to implement the allegedly discriminatory plan and that the plan was actually in effect.

ified conduct "for the purpose of interfering with the attainment of any right. . . ." 29 U.S.C. § 1140 (1982). Thus, actual deprivation is not a prerequisite to class liability under § 510, *ergo* the challenged act need not have caused actual deprivation or have actually interfered with the attainment of pension eligibility.

Because the district court construed § 510 as requiring actual deprivation of rights, it failed to consider properly the inchoate components of the liability avoidance scheme that, though producing no immediate or tangible effects on appellants' rights, nevertheless constituted deliberte steps undertaken for the purpose of interfering with appellants' attainment of pension eligibility. When so understood, it is clear that the district court's own findings are evincive of appellants' satisfaction of their burden to establish by a preponderance of the evidence that the plan was infested with discriminatory intent sufficient to constitute a violation of ERISA. Indeed, if Continental's liability avoidance scheme does not constitute direct proof of discrimination under § 510, we are hard pressed to imagine a set of facts that would.

In *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769 (11th Cir. 1982), the Eleventh Circuit observed:

> Where the evidence for a prima facie case consists, as it does here, of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the prima facie evidence the ultimate issue of discrimination is proved; no inference is required. Defendant cannot rebut this type of showing of discrimination simply by articulating or producing evidence of legitimate, nondiscriminatory reasons.

Id. at 774. We think that this standard applies with equal force to this case where appellants presented direct documentary proof of Continental's intent to discriminate against non-vested employees in the adoption and implementation of its liability avoidance plan. *See also Bell v.*

Birmingham Linen Serv., 715 F.2d 1552, 1556-57 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) ("It would be illogical, indeed ironic, to hold a . . . plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its actions.").

Moreover, the district court's findings of fact indicate that it credited appellants' case on the ultimate issue of discrimination.[37] The district court found that "Bell I was aimed at managing Continental's unfunded pension liabilities, by enabling it to describe its unfunded pension liabilities and *to avoid triggering future vesting*, while securing the employment of those employees whose benefits had already vested." *See* FF 53 (emphasis added).[38] We read

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[37] Indeed, Continental did not and does not here dispute the discriminatory motive of the liability avoidance plan. In its answer to the count of appellants' amended complaint that charged that the plan had been conceived with the proscribed intent, *see* Jt. App. at 34 (Count III, item 38), Continental did not offer an alternative purpose for the plan but rather entered a general denial. *See* Jt. App. at 44. Continental did attempt to characterize the permanent lay off classification as a mere bookkeeping entry. *See Brief of Appellee-Cross Appellant* at 13. The district court's findings, however, do not support such a characterization. Overall, Continental primarily directed its proof at trial and its arguments before this Court to the affirmative acts of the company alleged by appellants to have been taken pursuant to the discriminatory liability avoidance plan. Those arguments, which will be considered *infra*, do not undercut the allegation that the plan itself was imbued with discriminatory intent and constituted a violation of ERISA.

[38] Continental's internal memoranda described the plan as follows:

> The Bell System . . . enable[s us] to describe our unfunded pension liabilities and develop a strategic approach to avoiding future exposures while at the same time securing the employment of those employees in which the vast majority of the unfunded liability is vested. . . . In a capped situation, our manning latitude is limited to a specific point on the seniority roster. Beyond that point no

the court's finding as establishing that Continental devised its liability avoidance scheme for the sole purpose of preventing employees from attaining eligibility for the break-in-service pensions.[39]

In sum, appellants contend, and we agree, that the maintenance of the program with the specific intent to interfere with class members' pension eligibility was in itself a class-wide violation of ERISA entitling them to injunctive relief. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977) (proof of a discriminatory policy may justify injunctive relief); *cf. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. at 876 (proof of pattern and

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> recall can take place as recall will reinstate the employee's continuous service thereby preventing future liability avoidance. . . . In short, we need to identify, analyze and implement [specified] changes to our manning practices and our business selection and servicing which allow the maximum realization of profit in our capped locations.

Jt. App. at 1074-75

[39] That the avoidance of pension liability was Continental's *sole* purpose in instituting the liability avoidance program cannot be gainsaid. Nor can it be seriously contended that the liability avoidance scheme was legitimately designed to save the company from economic ruin.

Section 510 proscribes exactly this type of conduct. In enacting this provision, Congress recognized that it may sometimes be in the employer's economic self-interest to abort its employees' accumulation of the requisite age and service prior to vesting. Congress sought to provide safeguards for such abuses and to ensure that "an employer cannot fire anybody with impunity to avoid pension liability." 2 *Legislative History of the Employee Retirement Income Security Act of 1974*, at 1811 (1976) (remarks of Senator Javits). Thus, section 510's essential purpose is to prevent employers from intentionally interfering with impending pension eligibility whether motivated by malice toward the particular employee(s) or by a general concern for the economic stability of the company. Of course, as we noted *supra*, incidental loss of pension benefits as the result of a legitimate business practice will not constitute a violation of ERISA. Bad faith, however, is not an element of a section 510 claim.

practice of discrimination entitles class to prospective relief).[40] In light of the uncontested findings of the district court that establish the requisite discriminatory intent of the liability avoidance plan, *see* FF 53, 68, and in the absence of any rebuttal evidence from Continental that the plan was not so designed—wholly apart from the determination whether individual class members were actually laid off in accordance with the plan—appellants were entitled to an injunction on their claim that the liability avoidance plan, as implemented, violated § 510 of ERISA. *See Dillon,* 746 F.2d at 1004.

2. The Layoffs, the Cap and the Closure of the Pail Line

Appellants' remaining claims charge that Continental took specific actions, pursuant to its intentionally discriminatory liability avoidance scheme that resulted in their loss of employment. As to these claims, appellants assert that in light of the unrebutted evidence that Continental's liability avoidance program was adopted and implemented with discriminatory animus toward non-vested employees, they should have been accorded a presumption that each class member's job loss as a result of those actions was caused by the discriminatory policy. In this regard, appellants argue that the district court erred "in resolving the question whether the liability avoidance program *caused* the class members' loss of work in the liability trial, and imposing the burden on plaintiffs to prove that causation, when that question should have been remitted to the remedy trial with the plaintiffs enjoying a rebuttable presumption that their lost work was caused by the unlawful program and with the burden of proof on Continental to prove otherwise." Brief for Appellants at 22-23 (emphasis

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[40] In the instant appeal, the subsequent shutdown of the Pittsburgh plant renders injunctive relief unnecessary. That appellants adduced sufficient proof entitling them to such relief, however, is unaffected by the closure of the plant.

in original). In any event, appellants continue, "having found that the loss of work was the consequence of mixed motives, [the district court erred] in not imposing the burden on Continental to prove that the loss of work would have occurred in the absence of ("but for") the illegal motivation." *Id.* at 23.

At the conclusion of the "liability" trial the district court found that a motivating factor in Continental's decisions to close the pail line, to cap the Pittsburgh plant and lay off individual and class plaintiffs was to prevent employees from attaining eligibility for 70/75 and Rule of 65 benefits. *See* FF 106, 141. The court also found that Continental was also motivated by legitimate business considerations. *See* FF 107, 142. Continental does not dispute the findings of impermissible motivation; rather, it relies on the findings of the district court that hold that the results of the challenged actions would have occurred in any event, *see* FF 107, 142, as precluding liability.

Our consideration centers around whether the various burdens of proof in a class action where both permissible and impermissible factors are involved were appropriately allocated. In essence, appellants' contention is that in a class action context, the determination whether injury to individual class members was caused by a proved discriminatory policy is properly assigned to the "remedy" phase of the trial with the burden of proving that the injury was not so caused resting with the defendant. Although we agree with appellants' ultimate contention that in this case the "but for" burden of proof was misapplied, we shall take this opportunity to clarify various procedural misconceptions implicit in their argument. In order to assess properly the various elements of appellants' claim, then, it is appropriate to categorize those elements and to treat them separately.

a. Causation

Appellants point to three Supreme Court decisions for the proposition that "questions whether individual job loss

was *caused* by [a proved] violation . . . are to be addressed in the remedial phase of the litigation." Brief of Appellant at 33. In *Franks v. Bowman Transp. Co., supra,* a class action challenging the seniority and hiring practices of Bowman Transportation was resolved favorably for the plaintiffs. Certain seniority relief, however, was denied and plaintiffs appealed. Upon review, the Supreme Court held that the district court had improperly withheld seniority relief from unnamed members of the class on the basis that there was no evidence presented during the liability proceedings regarding vacancies, qualifications and performance for each member of the class. *Franks,* 424 U.S. at 772. The Court rejected the implication that such evidence was a prerequisite to classwide relief and further explained that where "petitioners . . . have carried their burden of demonstrating the existence of a discriminatory . . . pattern and practice by the respondents . . . the burden will be upon respondents to prove that individuals . . . were not in fact victims of . . . discrimination." *Id.*

International Bhd. of Teamsters v. United States, supra, echoed and elaborated upon the *Franks* methodology. In *Teamsters* the Supreme Court considered charges that both the employer and the union had engaged in a pattern and practice of discriminatory conduct. The Court again recognized two distinct stages of class action proceedings and articulated the requisite proof to be adduced at each stage. At the initial 'liability' stage, proof that the discriminatory policy actually existed is all that is required. *See* 431 U.S. at 360. "[T]he question of individual relief does not arise until [the 'remedial' stage, after] it has been proved that the employer has followed an employment policy of unlawful discrimination." *Id.* at 361.

Finally, in *Cooper v. Federal Reserve Bank of Richmond, supra,* the Supreme Court again gave recognition to the two-stage methodology. The Court noted that in a class context "[w]hile a finding of a pattern or practice of discrimination itself justifies an award of prospective relief

to the class, additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class." *Cooper,* 467 U.S. at 876.

In the instant appeal, the proceedings before the district court concluded after the "liability" stage of the litigation with judgment entered for the defendants. Appellants maintain that on the basis of *Franks, Teamsters* and *Cooper* the liability phase of this litigation actually ended upon their showing that Continental's liability avoidance program constituted a classwide violation of § 510 and that all questions of causation should have been remitted to the remedial phase of the litigation with the "but for" burden of proof resting with Continental. Appellants' argument is flawed in two respects.

First, this Court recently questioned the utility of approaching the burdens issue according to the label affixed to the particular stage of the litigation. Rather, in *Dillon v. Coles, supra,* we determined that the more helpful approach is to "review the proof requirements in each instance." 746 F.2d at 1004. Thus, determining whether the burden of proving causation is properly allocated depends not so much on the particular stage of the proceedings as on the actual evidentiary proofs in the record at the time of the allocation.

The Supreme Court's decision in *Burdine* makes clear that the plaintiff bears the burden of persuasion by a preponderance of the evidence to establish a case of discrimination. *See Burdine,* 439 U.S. at 252-53. The Court's decisions in *Franks, Teamsters* and *Cooper* require no less: The class representative bears the initial burden to make out the prima facie case, *see Teamsters,* 431 U.S. at 360 (interpreting *Franks*), and must "ultimately . . . *prove* . . . that . . . discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336 (emphasis added); *see also Cooper,* 467 U.S. at 876 (same). Where the ultimate factual de-

termination is still at issue, the "but for" burden of proof is properly assigned to the plaintiff and may operate to discharge the plaintiff's burden of persuasion and entitle him or her to relief.

In the instant appeal, the district court erroneously construed this "but for" burden as requiring appellants to prove that "but for" Continental's consideration of their impending pension eligibility, appellants would have *remained* at work; instead, that burden only requires proof that "but for" the impermissible consideration, appellants' would not have *lost* work. The distinction is significant. As this Court explained in *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1244 (1986):

> The "but for" test does not require a plaintiff to prove that the discriminatory reason was *the* determinative factor, but only that it was a determinative factor. Interpreting Title VII to require proof of "the determinative factor" is inconsistent with the "but for" causation test, insofar as plaintiff would be required to show that the discriminatory motive was the *sole* reason for the action taken. More than one "but for" cause can contribute to an employment decision, and if any one of those determinative factors is discriminatory, Title VII has been violated.

Id. at 179 n.1 (citations omitted).

Similarly, § 510 of ERISA requires no more than proof that the desire to defeat pension eligibility is "a determinative factor" in the challenged conduct. From our review of the record, it is manifest that the district court considered the appellants' burden of proof on causation to be significantly heavier than that required by our precedent. *See, e.g., Bellissimo*, 764 F.2d at 179 n.1 (but for causation requires proof that "the discriminatory reason was . . . a determinative factor") (emphasis in original); *Lewis v. University of Pittsburgh*, 725 F.2d 910, 915-16

(3d Cir. 1983), *cert. denied*, 469 U.S. 892 (1984) (but for causation requires more than proof that discriminatory reason was 'a substantial' or 'a motivating factor' in challenged decision); *Smithers v. Bailar*, 629 F.2d 892, 898 (3d Cir. 1980) (plaintiff need only prove that the discriminatory reason "made a difference" in the challenged decision). *Accord Dillon, supra; Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984). The district court repeatedly indicated that appellants' must prove not only that their impending pension eligibility made a difference in Continental's decisions that resulted in their layoffs, but also that those decisions and, consequently, their layoffs would not have occurred for any other reason.[41] *See* Jt. App. at 480, 628-33, 637-39, 676-77.

Under this Court's formulation of the "but for" test of causation, appellants' properly challenged the district court's application of a markedly different standard of proof. We stress, however, that our determination that the

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[41] The district court stated:

> [T]he courts have said that the tests that you apply are, you say, "Was [Continental's] desire to limit liability under ERISA . . . a determinative factor in the action that they took," but the courts have also said that the test you apply is "but for." In other words, but for their desire to limit liability, would this action have been taken? In other words, if the action would have been taken anyhow . . . for other reasons, [appellants] lose, . . . even though their desire to limit their liability was a determinative factor.

Jt. App. at 480. The district court's statement misrepresents the law on at least two levels. First, as became clear in subsequent colloquies, the court considered the burden of proving that the action would not have been taken for other reasons as resting with the appellants. As stated by appellants and supported by the case law, however, their "burden [is] to show [that the discriminatory reason] . . . made a difference. [They did] not have the burden to rule out all other causes." Jt. App. at 676. Second, in the district court's view, success on the merits required more than proof that discriminatory motivation was a determinative factor in challenged conduct. *See* discussion, *infra*.

district court erred in its application of the "but for" causation test is based upon the particular test applied, not on the propriety of requiring proof of causation as a prerequisite to a finding of liability. As to the latter issue, we think it clear that "but for" causation, properly construed, is an element of plaintiff's ultimate burden of persuasion. Appellants' broader contention, that their demonstration of a classwide violation in the adoption and implementation of the liability avoidance plan relieved them of the burden of proving that their job loss due to the cap of the Pittsburgh plant and the closure of the pail line was a result of the plan, however, requires further analysis. In this regard, it is necessary to determine the scope of the presumption that arises from proof of the discriminatory policy.

b. Presumption Of Individual Discrimination

There can be little doubt that upon proof of an intentionally discriminatory plan or policy, a presumption that they were actual victims of the discriminatory policy inures to the benefit of the individual class members.[42] *See Franks*, 424 U.S. at 772. In *Teamsters*, the Supreme Court stated that "[t]he proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." 431 U.S. at 362. Here, appellants urge that they were deprived of the *Teamsters-Franks* rebuttable presumption that each individual class member's job loss occurring during the period in which

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[42] "The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it was already been shown to have maintained a policy of discriminatory decisionmaking." *Teamsters*, 431 U.S. at 361-62. Put otherwise, in a class action setting, once the class representative has met the burden of persuasion on the ultimate issue in the case—whether the employer intentionally discriminated against the class—each individual member of the class is presumptively entitled to relief.

the liability avoidance program was in effect was caused by that discriminatory program. Before addressing appellant's contention we think it necessary to clarify the nature and scope of the *Teamsters-Franks* presumption.

The presumption that arises upon proof of a discriminatory policy attaches to all employer actions that may reasonably be considered as within the ambit of that policy. In other words, the *Teamsters-Franks* presumption presupposes a vertical nexus between the proved discriminatory policy and the employer conduct for which individual relief is sought. Thus, proof that an employer's standard operating procedure with respect to its hiring policies is intentionally discriminatory may not necessarily support a class member's individual challenge of the employer's promotion practices. *Cf. General Tel. Co. of Southwest v. Falcon,* 457 U.S. 147 (1982) (individual's challenge of employer's promotion practices did not necessarily render him an adequate representative for class challenging hiring practices). Similarly, the determination that an employer engages in classwide discrimination on one level is not tantamount to a conclusion that it does so on all levels. Thus, while proof of a discriminatory policy in one area of employment practice may be probative of the employer's intent in another area, it will not necessarily establish a presumption that the second area is similarly infested with the illegal intent.

At trial of this action, Continental specifically maintained that each of its challenged employment decisions were taken for legitimate purposes and not pursuant to the liability avoidance program.[43] Under these circumstan-

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[43] Indeed, as we noted *supra*, Continental contends that the liability avoidance program was never implemented at the Pittsburgh plant. That we have rejected this contention does not deprive Continental of its defense of legitimate purposes as to the individually challenged decisions. On the facts of this case, however, whether Continental bears a burden of persuasion or production as to its legitimate purpose de-

ces, Continental would have the *Burdine* burden shifting mechanisms apply at the threshold to each challenged act with the initial burden of persuasion on the plaintiff to prove a *prima facie* case by a prepondernace of the evidence that each act was a result of discriminatory intent. Continental suggests that to require otherwise would be to fasten liability onto Continental for "discrimination in the air." Brief for Appellee-Cross Appellant at 27 (paraphrasing *Dillon,* 746 F.2d at 1004). Continental misreads both our opinion in *Dillon* and the Supreme Court's decisions in *Franks* and *Teamsters.*

In *Dillon* this Court noted that in a class action context "the liability phase of the case is not concluded until [the individual class member] . . . demonstrates his own basis for an award." 746 F.2d at 1004. The court continued:

> It is misleading to speak of the additional proof required by an individual class member for relief as being part of the damage phase; that evidence is actually an element of the liability portion of the case. Until the individual has demonstrated actual injury to himself, the court may not direct individual relief. Just as in the tort field, where "negligence in the air" is not enough to fasten liability on a defendant, so in a Title VII case discrimination in general does not entitle and individual to specific relief.

Id.[44]

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fense depends on the specific act for which the defense is offered. *See infra.*

[44] Appellants suggest that our decision in *Dillon* is inconsistent with *Franks, Teamsters* and *Cooper.* We do not read *Dillon* as presenting such a conflict. First, *Dillon* primarily emphasized that the designation of a proceeding as liability or remedy should not be determinative of the proof required of the litigants in a discrimination suit. At any rate, we do not think the substantive discussion in *Dillon* is at odds with Supreme Court precedent. The additional proof to which *Dillon* refers consists of the demonstration that "vacancies or oppor-

Continental maintains that it "met its burden of proving that no one in Pittsburgh was affected by any alleged discriminatory policy . . . . [and t]hus, any presumption as to each Plaintiff and each class member disappeared and there was no basis for any remedy for anyone." Brief of Appellee-Cross Appellant at 26. Continental moves too far too fast.[45] While the "discrimination in the air" concept is relevant to an individual's entitlement to relief, it does not affect the presumption that arises upon proof of a discriminatory policy. Indeed, as recognized by this Court in *Dillon*, "[i]n a class action setting, an individual member may build on the discrimination established by the class." 746 F.2d at 1004. Thus, before reaching the question of individual entitlement, the preliminary issue concerns the nature and scope of the presumption arising from appellants' proof of a discriminatory policy.

In the instant appeal, Continental attempts to capitalize on the independent nature of appellants' § 510 claims. Because each challenged act may itself constitute a class-wide violation of ERISA, Continental essentially argues that each claim must satisfy the *Burdine* burden shifting

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tunities for employment or advancement existed." 746 F.2d at 1004. In the context of ERISA, after the class has established that it is entitled to an injunction, an individual class claimant need only show that s/he was eligible for break-in-service pensions, was available for work, designated as permanently laid off and laid off prior to vesting. As to why s/he was laid off, as noted in *Teamsters*, "the employer [i]s in the best position to show why any individual employee was denied an employment opportunity." 431 U.S. at 359 n.45.

[45] The defect in Continental's position stems from its erroneous assumption that the *Teamsters-Franks* rebuttable presumption "is no different than the rebuttable presumption existing after a plaintiff presents a prima facie case." Brief of Appellee-Cross Appellant at 24. To the contrary, the presumptions arising from each situation are quite distinct. As to the latter presumption, defendant's burden on rebuttal is merely one of production; as to the *Teamsters-Franks* presumption, however, the defendant's burden is one of persuasion. *See* discussion *infra*.

mechanism. Appellants would therefore bear the initial burden to prove by a preponderance of the evidence that Continental engaged in each act with the illegal intent to discriminate. Continental could then meet appellants' *prima facie* case by articulating a nondiscriminatory reason for its actions which raises a genuine issue of fact as to whether it discriminated. The effect of this approach, however, is to discount appellants' direct documentary proof of the discriminatory liability avoidance program, and consequently, to reduce Continental's burden on rebuttal. Such an approach is contrary to *Franks* and *Teamsters*.

Having established that Continental adopted and implemented a program premised on impermissible considerations and designed to achieve a discriminatory result, appellants were entitled to "an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362. We hold that the scope of the presumption arising from the discriminatory liability avoidance plan extends to those discrete acts which, as found by the district court, were specifically contemplated to implement the plan—namely, the designation of class members as permanently laid off, *see* FF 57, the institution of the red flag system *see* FF 69-70; and the capping of the Pittsburgh plant, *see* FF 54.

We are satisfied that as to these particular acts the vertical nexus contemplated by *Franks* and *Teamsters* inheres in the various components of the plan. While we recognize that the plan also specifically contemplated shifting business volume so as to avoid incurring additional pension liability, *see* FF 63, we are not convinced that the closure of pail line alone establishes the requisite nexus with the plan. Thus, the presumption arising from appellants' proof of the discriminatory liability avoidance program does not automatically extend to Continental's decision to close the pail line. That the presumption does

not so extend, however, does not alter the ultimate outcome of this appeal.

3. The *Teamsters-Franks* Presumption and the "But For" Burden in Mixed Motive Cases.

In *Franks, Teamsters,* and *Cooper, supra,* the Supreme Court acknowledged the propriety of shifting the burden of persuasion onto the defendant if it sought to avoid liability after proof of a discriminatory policy had been adduced. Thus, if after sifting through the evidence, a district court determines that the defendant has failed to introduce admissible or credible evidence sufficient to rebut the plaintiff's case, then, in accordance with *Franks, Teamsters* and *Cooper,* the "but for" burden of persuasion rests properly with the defendant. This "but for" burden requires proof from the defendant that it would have reached the same decision or engaged in the same conduct in any event, i.e., in the absence of the impermissible consideration, and operates to limit the scope of the relief available to individual class members. This Court has recognized that "placing the burden on the employer 'to demonstrate that the individual [class] applicant was denied an employment opportunity for lawful reasons,' is entirely consistent with the *Burdine* allocation of burdens in a suit brought by an individual plaintiff." *Dillon,* 746 F.2d at 1004 (quoting *Teamsters*) (citation omitted). This is so because at this stage the ultimate burden of persuading the court that the employer intentionally discriminated against the class has been carried. Thus, "[n]o reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the [but for] burden of proof. . . ." *Franks,* 424 U.S. at 773 n.32. In sum, placing the "but for" burden of proof on the employer at this juncture honors the presumption that arises upon proof of a discriminatory policy that the individual class members were discriminated against in accordance with that policy, while affording the employer the opportunity to limit its liability upon proof that, as to certain class members, it would have reached

the same decisions in the absence of the illegal motivation. *See Mt. Healthy City School District Bd. of Ed. v. Doyle,* 429 U.S. 274, 287 (1977); *cf. East Texas Motor Freight Sys. Inc. v. Rodriguez,* 431 U.S. 395, 403 n.9 (1977) (*citing Mt. Healthy* in Title VII context); *Bibbs v. Block,* 778 F.2d 1318 (8th Cir. 1985) (in banc) (applying *Mt. Healthy* to Title VII action); *Blalock v. Metals Trades, Inc.,* 775 F.2d 703 (6th Cir. 1985) (same).

At the outset, we recognize that this Court has held that proof that an impermissible consideration was a " 'substantial' or 'motivating' factor" in an employer's challenged conduct is insufficient to carry the plaintiff's burden of persuasion on the ultimate issue of discrimination. *Lewis v. University of Pittsburgh,* 725 F.2d 910, 915 (3d Cir. 1983), *cert. denied,* 469 U.S. 892 (1984). In the instant litigation although the district court found that the desire to prevent pension eligibility was "a motivating factor" in each of Continental's challenged decisions, we do not read the court's findings and ultimate conclusion that liability was not established in this case as resting on the determination that appellants had failed to prove the requisite degree of motivation, but rather, that appellants had failed to prove that "but for" that motivation they would have remained at work. Thus, we find it unnecessary to review the various versions of the facts urged by the parties before this Court. Nor do we deem it in the interest of justice to remand for clarification of the district court's findings. Indeed, to construe the district court's findings otherwise would render them clearly erroneous. As the Supreme Court explained in *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985), " 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Id.* at 573 (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948)). From our review of the entire record, we are convinced that the desire to

defeat pension eligibility was a "determinative" factor in each of Continental's challenged actions. *Bellissimo,* 764 F.2d at 179 n.1. A finding to the contrary would be clearly erroneous.

We now turn to the final issue in this case: the effect of the *Teamsters-Franks* presumption on the defendant's burden on rebuttal where discriminatory intent is established by proof that both permissible and impermissible factors motivated the challenged conduct. We conclude that whether the class representative discharges his or her burden of persuasion by offering direct proof of discrimination, circumstantial proof of discrimination or proof of mixed motivation, the *Teamsters-Franks* presumption attaches to each individual class member's claim that s/he was a victim of the discriminatory policy.

The class met its burden of proving that Continental's liability avoidance plan was discriminatory and the class members were therefore entitled to a presumption that their layoffs, as a result of the capping of the Pittsburgh plant, were in pursuant of that plan. *See* discussion, *supra.* Moreover, the district court's findings establish that appellants independently carried their burden of persuasion that Continental closed the pail line, capped the Pittsburgh plant and laid off individual members of the class for discriminatory purposes. Thus, as to each of the actions challenged by appellants, liability was established. Continental thereafter bore the burden of persuasion to prove by a preponderance of the evidence that it would have made the same decisions in any event.

On the facts of this case, however, the district court required the appellants to bear the burden that property rests with the defendant. Thus, the district court erred by misallocating the "but for" burden of proof that arises *after* appellants have carried their burden of persuasion on the ultimate issue of discrimination. That the court required appellants to prove that "but for" Continental's

decision to abort their pension eligibility they would have remained at work is manifest. We need only recite a few colloquies from the record:

THE COURT: "But if the defendants came in here and admitted that in order to avoid pension liability they laid these people off and they refused to recall them and that their sole reason was to avoid pension liabilities,—"

APPELLANTS: "Yes."

THE COURT: "—but then went on to say, 'But it doesn't make any difference, because we didn't have enough work to keep these people busy anyhow—so they would have been laid off even if that wasn't the case, and they wouldn't have been recalled even though that wasn't the case, because we didn't have any business,'—"

APPELLANTS: "Right."

THE COURT: "—you could not succeed."

APPELLANTS: "Well, unless I persuaded you—First of all, that would be an item of damage. But if they did that, if they sustained their burden, then I agree that I would then have to show you that that was a ruse or not true. They would have the burden of proving that to you if they were able to present such testimony, but that would be an item of damages."

THE COURT: "Yes, but you first have the burden."

APPELLANTS: "That's true. We have the burden of showing by a preponderance—"

THE COURT: "You have the overall burden."

APPELLANTS: "Of showing by a preponderance of the evidence in accordance with the standards that this made a difference."

THE COURT: "And because as to the recalls a directed verdict was issued because you presented no evidence, *it requires you to present in evidence that these people would have been recalled—*"

APPELLANTS: "If the Court—"

THE COURT: "*—except for the fact of their evil intent.*"

Jt. App. at 630-31.

THE COURT: "[J]ust assuming, not that they are admitting, but assuming that [Continental] would admit they didn't want to pay pensions and they would do anything they could to avoid paying pensions, unless you can prove these people would have worked if they didn't have that attitude about pensions, you can't win."

APPELLANTS: "It is true that on damages—I think, Your Honor, that has to do with damages. If they came in and said, 'Yes, we laid them off to avoid pension liability, we discriminated against them, we—' "

THE COURT: " 'But it doesn't make any difference because we didn't need them anyhow.' "

APPELLANTS: "But if they say, 'We violated the statute, we discriminated against

them, we laid them off, we discriminated, we called them—that's why we laid them off, to avoid pension eligibility,' then on liability they have violated the statute. As to damages—"

THE COURT: "*I'm saying no, they haven't, unless you show that but for that,* [*appellants*] *would have worked.*"

Jt. App. at 632-33. Finally, the court summarized its view of the allocation of the burden of proof in the following passage:

THE COURT: "The problem I am having, Mrs. Litman, very truthfully is, *even if you prove that they did this deliberately with the intent to deprive these people of their pension rights, unless you are able to show that they would have been called back but for that, you haven't proved your case.*"

Jt. App. at 637 (emphasis added).

We think it clear that the district court required appellants to prove more than that Continental's desire to prevent pension eligibility was a determinative factor in their layoffs. Because we find that the district court misallocated the burden of proof on this issue we do not reach appellants' contentions that the court's factual findings in this regard were clearly erroneous.

CONCLUSION

In sum, we find that the district court erred in failing to conclude that Continental's liability avoidance plan constituted a classwide violation of ERISA. The district court properly determined that causation was an element of li-

ability and that the burden of proof on that issue lay with the appellants. The district court erred, however, in not recognizing that appellants carried their burden of proof on causation by establishing that Continental's challenged decisions were motivated by both permissible and impermissible factors. Finally, the district court erred in allocating the "but for" burden of proof on appellants as to their challenges to their layoffs, the capping of the Pittsburgh plant and the closure of the pail line, requiring them to prove that "but for" Continental's consideration of impermissible factors they would have retained their jobs.

Accordingly, we will reverse the judgment of the district court and remand for proceedings to determine the appropriate relief. We emphasize our holding that Continental's liability avoidance scheme constituted a violation of ERISA when, pursuant to that scheme, individual class members—whether currently at work or already layoff status—were designated as permanently laid off for the purpose of defeating their pension eligibility. Upon such designation, each class member was entitled to some relief from the illegal scheme. At what point and in what amount actual damages, if any, began to accrue as to any particular class member, however, will be a determination to be made in the proceedings upon remand. In those proceedings, individual class members must first establish that they were (1) non-vested employees eligible for 70/75 and Rule of 65 benefits, (2) available for work, (3) labeled as permanently laid off by Continental, and (4) laid off or continued on layoff status prior to attaining eligibility for those benefits. Continental must then be afforded the opportunity to present evidence that as to any particular individual class member's request for relief, that individual is not so entitled because in the absence of Continental's illegal plan that individual would have been without work at the same time in any event. We do not foreclose an opportunity for Continental to submit its proofs collectively as to all of the plaintiffs. That is, if the proof as to each

individual is the same, there is no requirement that Continental repeat the same evidence for each claimant. Continental must establish either collectively or individually that class members would have suffered the same loss of work even in the absence of the illegal plan. Continental's burden on this issue will be one of persuasion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1519

ROBERT GAVALIK, *et al.*,

Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,

Defendant.

Civil Action No. 82-1995

ALBERT J. JAKUB, *et al.*,

Plaintiffs,

vs.

CONTINENTAL CAN COMPANY, a member of Continental Can Group, Inc.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs in these consolidated actions allege violations of § 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140.

On January 17, 1984, the Court granted plaintiffs' motion for class certification under Fed. R. Civ. P. 23(b)(3) in Civil Action No. 82-1995 and held that it would consider these consolidated cases as a single class action. (*See* Civil Action No. 81-1519, docket entry No. 176). The class consists of the following members:

> [A]ll Continental employees who did not achieve eligibility for Rule of 65 or 70/75 pension benefits who were determined by Continental to be permanently laid off in 1976, 1977 or 1978 because of Continental's decision to cap the Pittsburgh plant, including but not limited to all employees whose names fall below Francis Conti's on Continental's seniority roster.

This action was bifurcated as to liability and damage issues for trial. The matter proceeded to trial on the issue of liability on July 22, 1985, and concluded on August 8, 1985. Having considered the testimony, reviewed the exhibits and read those depositions admitted into evidence, this Court now enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Individual and class plaintiffs are former employees of Continental Can Company U.S.A.'s (Continental or the Company) Pittsburgh plant located in West Mifflin, Pennsylvania.

2. Plaintiffs are all participants in an employee benefit plan within the meaning of 29 U.S.C. §1002(7).

3. The United Steelworkers of America, AFL-CIO (USW or the Union), and Local Union No. 4337 (Local 4337) are the recognized collective bargaining agents for the individual and class plaintiffs.

4. During 1977, each of the plaintiffs was a member of Local 4337.

5. Continental is a corporation doing business in Pennsylvania and is a member of the Continental Group, Inc.

6. Continental is engaged in the business of can manufacturing.

7. Continental is an employer engaged in commerce within the meaning of 29 U.S.C. §1003(a)(1).

I. Continental's Employee Benefit Plan

8. As a result of a collective bargaining agreement with the USW (the Master Agreement), Continental agreed, effective November 1, 1977 through February 15, 1981, to provide the following benefits to plaintiffs:

A. Pensions

9. Normal Pension—an employee who had completed 10 years of credited service at age 62 could elect to retire and would receive a lump sum retirement allowance covering the first three months of retirement, and after three months a normal pension, which amount was determined on the basis of years of service and job classification.

10. Reduced Early Pension—an employee who had completed 10 years of regular continuous service may retire any time after reaching age 60 and before reaching age 62 and receive a lump sum retirement allowance covering the first three months of retirement, and after three months a reduced early pension.

11. Thirty-Year Pension—an employee who had completed 30 years of regular continuous service may, at his option, retire at any time before reaching age 62 and receive a lump sum retirement allowance covering the first three months of retirement, and after three months a 30-year pension.

12. 70/75—an employee may retire before age 62 with a lump sum retirement allowance covering the first three months of retirement, and after three months a 70/75 pension. The 70/75 pension is equal to the normal pension. In addition, the employee receives a monthly supplement of $300 ($230 for payments due before August 1, 1977) until eligible for social security, which is normally until age 62.

13. In order to qualify for a 70/75 pension, an employee must meet the following requirements:

a. His regular continuous service is broken for at least two years as a result of a permanent plant shutdown, involuntary layoff or absence due to physical disability; and

b. The employee completed at least 15 years of continuous service and is 50 years of age or older and whose combined age and service equal 70 or more; or

c. The employee has completed at least 15 years of regular continuous service and whose combined age and service equal 75 or more.

14. Rule of 65—an employee not entitled to retire on a 70/75 pension whose last day worked was on or after March 1, 1977, is entitled to a Rule of 65 pension upon meeting the following requirements:

a. The employee's regular continuous service is broken for at least two years as a result of a plant shutdown, involuntary layoff or physical disability which extends for more than two years, or Continental decides prior to that time that it is unlikely that the employee is likely to return to work;

b. The employee completed 20 years of continuous service as of the last day worked;

c. The employee has not attained age 50 and whose combined age and years of service equal 65 or more but less than 75; and

d. The Company has not provided the employee with suitable long-term employment.

15. The Rule of 65 pension benefit is equal to the normal pension, except that Rule of 65 payments are reduced by

the amount of income that the employee earns during layoff.

16. Disability Retirement—an employee who has completed at least 10 years of regular continuous service, and was under age 62, and who became totally and permanently disabled, could retire and receive a normal pension and a monthly supplement of $300 ($230 for payments due before August 1, 1977) until eligible for social security.

17. Deferred Vested Benefit (DVB)—an employee who broke his regular continuous service for any reason and was not eligible for a pension, was entitled to a DVB if he had completed 10 years of credited service at the time of the break in service. The DVB was payable in full upon the employee reaching age 62.

18. An employee who has completed 17 years of regular continuous service as of the last day worked and is on layoff or has broken his regular continuous service because of a plant shutdown may elect to receive payment of the DVB in the form of a lump sum.

19. An employee's regular continuous service begins on the day the employee was hired and is broken if the employee is absent for more than two years due to: (a) layoff; (b) approved leave of absence; (c) physical disability; or (d) permanent plant shutdown with respect to which he did not elect to receive a severance allowance.

20. An employee's regular continuous service for pension and employee benefits continued for two years after layoff. This was known as "creep."

21. Under the 70/75 pension plan, an employee could creep into the necessary age and service requirement.

22. Under the Rule of 65 benefit, an employee could creep into the age requirement but could not creep into the service requirement.

B. Insurance

23. Continental employees were entitled to vision, health, life and disability insurance benefits. All retired employees (except those receiving DVB pensions) were entitled to receive health and life insurance benefits.

C. Supplemental Unemployment Benefits (SUB)

24. An employee with 10 years of continuous service is entitled to receive between 60 and 70 percent of his salary during layoff in addition to his unemployment benefits.

D. Expanded Employment Program (EEP)

25. An employee with 15 years of regular continuous service is entitled to an extended 13 weeks vacation once every 5 years.

26. In addition to their employee welfare benefits, USW employees were paid for 10 holidays at the number of straight-time hours he normally worked on his regular shift, but not more than 8 hours.

27. An employee who was required to work any of the observed holidays received holiday pay. In addition, he received 1-1/2 times his regular straight-time hourly rate for the first 8 hours of work and 2-1/2 times his regular straight-time hourly rate for all work he was required to work over 8 hours.

II. History of Continental's Business

28. Continental, like other can manufacturers, experienced a period of growth, particularly during the 1960's and continuing until the early part of the 1970's.

29. The base box volume, which is the can industry's standard of measurement, of Continental grew from 34.3 million to 44.8 million from 1960 to 1970.

30. From 1965 to 1970, Continental opened over 41 new plants and closed 11 facilities. By 1975, Continental had 92 plants.

31. Unlike its growth pattern of the 1960's, Continental experienced a steady decline in its volume of business in the 1970's, as evidenced by the following:

a. The number of plants decreased from a high of 92 in 1975 to 66 in 1979, including the closing of 7 plants in 1976, 7 in 1977, and 6 in 1978.

b. Since 1975, Continental has closed 33 can-making facilities and, during that time, no plants comparable to the Pittsburgh plant were opened.

c. The base box volume in beverage cans decreased from 12.0 billion in 1970 to 10.4 billion in 1978.

d. Hourly employees decreased from 15,000 in 1974 to under 10,000 in 1979, a reduction of 33 percent.

e. Salaried employees decreased by 50 percent from 1973 to 1982.

32. The loss of business was caused principally by:

a. The advent and increasing use of composites, such as plastics instead of steel cans;

b. The change from steel cans to aluminum cans;

c. The increase in self-manufacturers, i.e. industries which formerly purchased cans started to make cans themselves; and

d. Technological changes in the industry.

33. The most significant technological change was the conversion from 3-piece cans to 2-piece cans. Two-piece can lines produced cans faster with fewer employees and

eliminated not only the making of one end, but also the separate lithographic operation which does the decorating work for the cans. Unlike a 3-piece can, the lithographic work was done in the production line on a 2-piece can.

34. In 1970, Continental had 147 3-piece beverage can lines and only one 2-piece line. By 1979, there were 54 3-piece beverage lines and 28 2-piece beverage lines.

III. Benefit and Labor Costs

35. In the mid-1970's, Continental recognized that benefit and labor costs had become a major expense. In preparing for the 1977 negotiations, Continental reviewed annual labor costs for USW employees for the year 1972 and for the year 1977 and found them as follows:

	1972	1977
Wages (including overtime)	$7,152/year	$14,224/year
Benefits:		
– group ins. (active)	$ 624	$ 2,300
– group ins. (retiree)	$ 192	$ 354
– pension (normal)	$ 480	$ 1,132
– pension (past service)	$ 224	$ 281
– taxes	$ 464	$ 1,071
– SUB	$ 144	$ 187
– vacation/bonus	$ 448	$ 1,309
– holidays	$ 288	$ 639
– EEP	$ 176	$ 408
– shift premium/misc.	$ 240	$ 391
Total Benefits	$3,280/year	$8,072/year
Total Annual Labor Cost	$10,432/year	$22,296/year

36. An employee who had over 10 years of service would receive the entire benefit package for the full year and full credit for EEP if he worked only one day in a particular year.

37. Almost 70 percent of Continental's benefits costs were related to an employee who worked one day. The other 30 percent for holiday pay and payroll related taxes was generated on a relatively variable basis as a function of hours worked.

38. If an employee was recalled to work for one day, that day commenced a new 2-year continuous service period, even if immediately laid off, plus renewal of other benefits.

39. Based on actuarial assumptions, Continental contributed to a pension trust on the assumption that an employee would work until age 62, at which time his pension would be fully funded. Unfunded liability is that portion of a pension which has not yet been funded by contributions.

40. As of 1977, the triggering of a 70/75 pension benefit could cost Continental, depending upon the employee's years of service and age, between $40,000 to $100,000 per employee.

41. Under the applicable accounting principles used by Continental prior to 1981, if any plant would close, the amount of the unfunded pension liability had to be charged against income in the year the plant was closed.

IV. Continental's Work Force Management Program (the Program)

A. Why the Program Was Implemented

42. In the early 1970's, due to a decline in its business, Continental had excess plants and employees and underutilized equipment and had projected a continued decline in its business.

43. In 1972, Continental realized that with its reduced business, it would be required to close various operations, modernize, and realign its facilities. To provide a method

for funding the cost to be incurred, including employee benefits such as continued insurance coverage, SUB and 70/75 pensions, it created a reserve of $231 million. The reserve was called Extra Charge Authorization (ECA).

44. By 1976, this reserve had been substantially consumed and Continental knew that it was going to incur further expenses as a result of its continually declining business.

45. In 1976, Continental created another reserve in excess of $100 million to fund such expenses. This reserve, which unlike ECA which came out of the income of the parent company, came out of the income of the can company. It was called the Plant Utilization Program (PUP). This reserve provided funds for various costs which would be incurred in the event of a plant shutdown, including employee benefits.

46. Many of the Continental USW employees at the Pittsburgh plant were working less than 1,000 hours a year, to wit:

Year	Number of employees working less than 1,000 hours per year
1975	215
1976	162
1977	118
1978	76

Continental determined that an efficient and hence optimum level of manning would result in an employee working between 1,800 and 2,000 hours per year.

47. Each plant had a number of employees who were employed when other employees were on vacation, sick leave, EEP and other temporary leaves of absence. This was referred to as "float." In order to decrease its float requirements, Continental tried to schedule vacations and EEP on a steady and regular basis throughout the year

and not concentrated in the summer months when business was at a peak.

48. Continental employees at Pittsburgh preferred working on a steady basis throughout a year, rather than constantly being laid off and recalled to work.

49. In 1975, Continental recognized that in a period of declining business, it had to more carefully manage its work force to obtain better utilization and to more evenly distribute production throughout the year.

50. In order to operate more efficiently, Continental determined that it would have to concentrate its business into plants which would be more efficiently and fully utilized.

B. What Was the Program

51. In 1976, Stephen Rexford, Manager of Employee Relations and Strategy Planning, was put in charge of a project aimed at raising the plant manager's understanding of the employee benefit expense to the same level of other business costs.

52. Rexford developed a system known as the Bell System.

53. Bell I was aimed at managing Continental's unfunded pension liabilities, by enabling it to describe its unfunded pension liabilities and to avoid triggering future vesting, while securing the employment of those employees whose benefits had already vested.

54. In order to implement the goals of Bell I, Continental developed a "cap and shrink" program. A "cap" was defined as a work force reduction in order to reduce unfunded liabilities. A "shrink" was defined as a work force reduction due primarily to market or manufacturing conditions.

55. The decision to cap and shrink a plant was made on the basis of employee benefit costs, a given plant's age, capital depreciation, condition, layout, machinery, customer base, manufacturing effectiveness and capability, product mix, geographical proximity to markets, proximity to transportation, and lease provisions.

56. In determining the cap or manning level of a plant, Continental considered the needed level of production to meet projected sales and, based thereon, limited the employment level to a specific name on the seniority roster. This cap was to remain in place for five years, without recalling employees from layoff unless business conditions justified the recall and approval was received from the highest level of Continental's management.

57. Employees below the cap who were laid off were designated as permanently laid off. Continental did not inform these employee's that they would not be recalled.

58. One of the purposes of PUP was to contain the people cost liabilities which would be incurred in the event of a plant shutdown, while optimizing facility utilization.

59. By setting a cap on a plant's work force, Continental sought to limit future unfunded liabilities and to cause the plant manager to more effectively utilize all employees.

60. Prior to the time that Continental had developed a cap program, it had determined the level of manning required to produce the anticipated volume of business as follows: Starting in August or September, it would plan for the coming year which would consist of its sales department projecting what would be sold in the future year and the type and the nature of the product. Continental would then determine for each facility what was the required manpower to produce that volume. This was referred to as the required level of manning.

61. As part of Bell II, Continental's plant managers were instructed to fit the business to the available manning

in order to force increased utilization of employees, to improve competitiveness and to insure a secure business.

62. Baltimore, Patterson and Pittsburgh were selected as "concept development plants" for implementing the Bell System due to their mature work force, high overhead costs and potentially high unfunded liability costs.

63. In order to maintain the capped work force, Continental informed its plant managers that business volume could be shifted to plants where the work was necessary to keep employees with vested 70/75 benefits employed or shifted to plants with low unfunded liability.

64. The Bell System employed scattergraphs which were computer printouts depicting a plant's work force at a particular point in time. The scattergraphs were developed to describe the unfunded 70/75 and Rule of 65 liabilities that would be triggered at a given point in time. Thus, by looking at a scattergraph, a plant manager could ascertain the number of USW employees already vested for 70/75 and Rule of 65 benefits and those employees in the 2-year creep category.

65. This type of information had been regularly requested by the USW in preparation for negotiations leading to the Master Agreements.

66. The scattergraphs could not measure the effects of various levels of plant layoff due to plant shrink, i.e. attrition due to death, voluntary retirements or quit. Further, each plant's seniority practices, unwritten practices and understandings impacted on which employees could be laid off.

67. Another factor which impacted upon the plant manager's ability to ascertain which employees were in the vested or non-vested categories was Inter Plan Job Opportunities (IPJO). Under the Master Agreement, USW employees laid off from one Continental plant could transfer to another plant where they had preferential hiring

rights. Therefore, an employee assumed to be permanently laid off from one plant may in fact continue working in another plant. Under the Master Agreement, USW employees were entitled to preferential recall rights for a period of five years.

68. Continental often referred to the goals outlined in the Bell System as "liability avoidance." It had two aspects: (a) sheltering or keeping employed 70/75 qualified employees so that their employment was assured throughout their normal careers; and (b) preventing further employees from qualifying for 70/75 pensions.

69. On April 1, 1977, a liabiiity avoidance tracking system was put into effect called "Red Flag." It was tied to the payroll system and designed to automatically generate a report when an employee designated as permanently laid off received a pay check.

70. A red flag would be generated whenever an employee received a pay check for actual hours worked, vacation or EEP payments.

V. Union Negotiations as to Plant Level Seniority

71. Under departmental seniority, each department is set up as a separate unit within the plant. As a particular department underwent a reduction in activity, the employees could bump other less senior employees only within that department. Thus, under departmental seniority, employees with great amount of seniority can be on layoff, while employees with shorter amounts of service are retained in an unaffected department.

72. Under plant-wide seniority, an employee could bump any employee throughout the plant who had less seniority.

73. The USW wanted to establish plant-wide seniority in both the steel and can industries for the following reasons:

a. It had been charged by the Equal Employment Opportunity Commission with discrimination based upon a departmental seniority system; and

b. It wanted to provide the maximum job security for its senior employees.

74. Continental wanted plant-wide seniority in order:

a. To allow it to retain its most senior employees who were the most skilled and loyal to the Company;

b. To retain employees with vested 70/75 and Rule of 65 pension benefits and thereby avoid triggering those benefits; and

c. To layoff the junior employees whose benefits had not yet vested.

75. On or about April of 1977, officials at Continental plants throughout the United States were considering changing their seniority practices.

76. The seniority rules and units were to be made by agreements between the plant manager and the local union at each plant.

VI. History Leading to the Rule of 65 Pension Benefit

77. The 70/75 pension benefit plan had been in effect since 1971.

78. On November 1, 1977, Continental agreed to provide its USW employees with a Rule of 65 pension benefit effective January 1, 1978, applicable to employees laid off on or after March 1, 1977.

79. The Rule of 65 was first formally proposed by the USW during the October, 1977 negotiations that led to the adoption of the Master Agreement.

80. The steel, aluminum and can industries follow what is known as "pattern bargaining," whereby the same terms, benefits and conditions adopted by the USW and any of these industries is usually requested in the other industries.

81. Prior to the commencement of the 1977 can industry negotiations, USW had negotiated and received a Rule of 65 benefit from the steel industry in April of 1977 and the aluminum industry in May of 1977.

82. Tom Duzak, the USW's negotiating representative for benefits, sent Continental's negotiating representatives a copy of the steel industry's agreement approximately a week after its conclusion in April of 1977. Further, the general outline of the steel industry agreement was reported in the Wall Street Journal which was read by Robert Adams, Director of Employee Benefits-Domestic Can Operations. Although the details of the Rule of 65 benefit had not been worked out at the conclusion of the steel industry negotiations, Continental knew that it involved a 20 year service requirement and would be triggered in the event of a plant shutdown or extended involuntary layoff.

83. Richard Luzzi, Human Relations Manager for Pittsburgh, and Adams, who headed the benefits committee for Continental during the October, 1977 negotiations, knew prior to the commencement of the can industry negotiations that the steel and aluminum industries had agreed upon a Rule of 65 benefit and expected the USW to demand a Rule of 65 benefit during the October negotiations with the can industry.

84. On August 29, 1977, Continental analyzed Rule of 65 benefit costs in relation to certain changes in plant alignment.

VII. The Pittsburgh Plant

85. The Pittsburgh plant, which was designated as Plant No. 72 (the Pittsburgh plant) was opened in 1947 as a consolidation of three other plants.

86. At the time the Pittsburgh plant was opened, metal cans were predominant in the industry and the plant was in a geographically desirable location because it was near the steel mills which produced the raw materials and close to its customer base.

87. During the 1970's, the Pittsburgh plant lost its customer base.

88. In the early 1970's and prior to 1975, due to decreased business, a number of the Pittsburgh plant's production lines were closed.

89. The Pittsburgh plant had a 3-piece line for producing steel cans. It never had a 2-piece line, nor did it have a line for producing aluminum cans.

90. In 1975, the Pittsburgh plant became a service center. A service center is a plant which produces parts for other plants. The Pittsburgh plant provided the following services: (a) making of ends for cans; and (b) doing lithography for other plants.

91. The Pittsburgh plant had one line for making pails, such as 5-gallon steel containers.

92. The pail line which had been in existence since the early 1950's was located on two floors. The shearer for cutting coils, which is the first operation, was at a considerable distance from the pail line. The finished product had to be carried on an overhead conveyor a considerable distance to the shipping ramp.

93. Prior to mid-1975, the pail line was part of the Pittsburgh plant. At that time, in order to determine whether the pail line was a profitable or unprofitable operation, it was made a separate plant and designated Plant No. 478. However, the Pittsburgh plant and the pail line continued to utilize the same seniority roster.

IX. Closing the Pail Line

94. Continental's accounting system used an estimated standard cost for materials and any increase or decrease from this standard cost was called a "variance" which was carried directly to the bottom line as a profit or loss.

95. For example, if the standard cost of materials for making a pail was $1.00 and labor costs was $2.00, the total cost was $3.00. If the plant could obtain materials for 25 cents and its labor cost was still $2.00, it showed an additional profit of 75 cents because it acquired the materials for 75 cents less than the standard cost of $1.00.

96. During 1976 and 1977, the pail line was able to purchase materials which had been rejected for making cans. The material was acquired at a price substantially less than the standard cost, which resulted in a profitable variance. By 1978, Continental could no longer purchase materials at a variance.

97. For the year ending 1976, the pail line showed a profit of approximately $600,000, of which $300,000 was due to variance in material purchases. Thus, the true plant profit was only $300,000 which did not include expenses and salaries of its two salesmen, overhead and administrative expenses.

98. For the year ending 1977, the pail line showed a profit of approximately $300,000, of which $345,000 was attributable to variance. Thus, the pail line really lost $45,000 plus additional losses for sales and administrative expenses. The pail line's 1977 income was also impacted by a plant shutdown for five weeks due to an energy shortage.

99. In the spring of 1975, Bill Woodruff was made manager of the pail line and to enhance its business, two salesmen were employed solely for the pail line. During 1976, Woodruff instituted a number of measures to in-

crease productivity of the pail line and to reduce the number of people required to operate it.

100. Woodruff, as plant manager, was initially optimistic by the improvement that the steel pail line had shown since he had become plant manager. His optimism was initially shared by John Andreas, Manager of Manufacturing for General Packaging Division. However, Woodruff recognized that the profit level, which was approximately five percent, was not acceptable to him or Continental management. He also recognized that there was little that could be done to further increase the efficiency or profitably of the pail line if it remained in Pittsburgh.

101. In the early part of 1977, Woodruff prepared a report concerning the pail line and ways to improve its profitability. He considered three possibilities:

a. An extended 2-shift operation;

b. A limited 3-shift operation; and

c. Moving to a new location.

102. Based on his analysis, moving to a new location had the greatest potential, particularly in view of the potential market in the southeast and eastern coasts.

103. During July and August of 1977, a number of meetings were held by various members of Continental's management concerning the pail line and Woodruff's recommendation that it be moved to a new location.

104. The factors which were considered by Continental management as to whether (a) the pail line should remain in Pittsburgh, (b) the pail line should be moved to a new location, and/or (c) the pail line should be closed were:

a. The existing inefficiencies of the pail line due to its location an configuration which could not be improved;

b. Profitability of the operation could not be improved. Further, the market projection was

stable to a 10 percent decline over the next 10 years;

c. Some erosion of the current steel volume into plastic;

d. The potential future business for sales lay in the southeastern United States;

e. The existing operation had a high labor cost due to the large number of people needed to operate the line because of its layout; and

f. To facilitate the Pittsburgh cap and shrink program.

105. The decision to close the steel pail line was made by Donald Bainton, Executive Vice President and General Manager of Continental Can Company USA, on August 29, 1977.

106. A motivating factor in Bainton's decision to close the pail line was to prevent employees from attaining eligibility for 70/75 and Rule of 65 benefits.

107. A motivating factor in Bainton's decision to close the pail line was the fact that it was an unprofitable business in Pittsburg.

108. The decision to close the pail line was made before Continental decided to move the pail line.

X. Determining the Level of Manning and Cap at Pittsburgh

109. At a June 23, 1976, meeting at Hunt Valley, Bainton gave approval to Continental management to reduce the USW work force at Pittsburgh to 417 employees by the end of 1977.

110. On December 31, 1976, the Pittsburgh plant was capped at 574 USW employees. A cap was not set for

employees represented by the other two unions at the Pittsburgh plant.

111. On January 27, 1977, Louis Hoffman, Director of Facilities Utilization for Coastal Operations, indicated that the ideal cap, disregarding volume assumptions and other factors except unfunded people costs, would be 392 USW workers as of December 31, 1977, rather than the previous recommendation of 417 USW employees.

112. Prior to 1977, the Pittsburgh plant and the pail line had departmental seniority.

113. On or about April of 1977, Continental officials began meeting with USW officials to discuss implementing plant-wide seniority at the Pittsburgh plant.

114. Continental officials wanted plant-wide seniority at the Pittsburgh plant for the reasons set forth in fact finding No. 74.

115. Continental estimated that the savings under plant-wide seniority as opposed to departmental seniority in the event of a plant shutdown at Pittsburgh would be $1.5 million.

116. Under plant-wide seniority, Continental could successfully remove the pail line from Pittsburgh without incurring tremendous expense.

117. At the time of the negotiations relating to local seniority rules and pay practices, officials of the local union knew that Continental was going to close the pail line.

118. In the summer of 1977, Stephen Rexford met with local union representatives at the Pittsburgh plant to negotiate plant-wide seniority.

119. In exchange for the local union at the Pittsburgh plant to agree to plant-wide seniority, Continental agreed to use its best efforts to keep employed all employees who had 20 years of service.

120. Pursuant to this agreement, the cap level for the year 1978 was increased from 417 to 472 which included 436 USW Production and Maintenance employees above the 20-year cap line and 36 skilled employees below the 20-year cap line.

121. The 20-year line was drawn under the name of Francis Conti.

122. On October 28, 1977, Continental and the local union formally agreed upon the implementation of plant-wide seniority which was to be effective November 1, 1977.

XI. Effect of Cap at Pittsburgh and Number of Employees Working

123. Following the setting of the cap of 472 USW employees as a result of the agreement as to plant-wide seniority, Continental brought additional business into the Pittsburgh plant and, in furtherance thereof, installed an UV lithographic equipment line, 10 additional minsters and presses for making aerosal ends.

124. With the additional business moved into the Pittsburgh plant, Continental projected that the Pittsburgh plant would only utilize 86.6 percent of its litho load and 79.2 percent of its coders.

125. In 1978, Continental transferred into the Pittsburgh plant sufficient work to keep its litho equipment running at full capacity.

126. During the 1977-78 time period, the Pittsburgh plant did not have sufficient business to employ all the USW employees above the cap line, and the average number of USW employees at work was as follows:

1977	Avg. No. of USW employees at work
July	367
August	363

September	381
December	227
1978	
January	269
February	339
March	320
April	342
June	300
August	374

127. From 1972 until 1976, 185 USW employees were laid off.

128. Between January 23, 1976 and December 22, 1976, 35 USW employees were laid off.

129. Between June 24, 1977 and December 31, 1977, 73 USW employees were laid off; most of the layoffs occurred in November and December of that year.

130. Between January 1, 1978 and September 30, 1978, 15 USW employees were laid off.

131. Between February 1, 1979 and June 18, 1982, 33 USW employees were laid off.

132. The pail line was closed after Continental and the union signed the agreement negotiating the implementation of plant-wide seniority.

133. The closing of the pail line resulted in the elimination of 111 jobs at Pittsburgh.

134. All of the plaintiffs were laid off in accordance with seniority on a plant-wide basis pursuant to the agreement and, if replaced, were replaced by USW employees with greater seniority.

135. All recalls by Continental at the Pittsburgh plant were done in accordance with plant-wide seniority.

136. Plaintiff Albert Jakub was laid off on December 22, 1977, at which time he was 44 years old and had 19 years and 7 months of service with Continental.

137. Plaintiff Francis Humenik was laid off on April 21, 1978, at which time he was 41 years old and two weeks short of attaining 20 years of service.

138. Plaintiff Thomas Riley was laid off on April 21, 1978, at which time he was 39 years old and needed 16 days to attain 20 years of service.

139. Plaintiff Anthony Folino was laid off on January 1, 1978, at which time he was 44 years old and had 18 years and 8 months of service with Continental.

140. Plaintiff Robert Gavalik's layoff date was January 1, 1978, at which time he was 40 years old and had 19 years and 7 months of service.

141. A motivating factor in Continental's decision to cap the Pittsburgh plant and lay off individual and class plaintiffs was the desire to prevent further employees from attaining eligibility for 70/75 and Rule of 65 benefits.

142. A motivating factor in Continental's decision to cap the Pittsburgh plant and lay off individual and class plaintiffs was declining business conditions and a desire to more efficiently operate its plant.

143. Out of the 341 USW employees below Conti on the February, 1979 seniority list, 25 received 70/75 pension benefits and 25 received Rule of 65 benefits. Out of the 50 people, 17 had special skills.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to 29 U.S.C. §1132.

2. The Rule of 65 and 70/75 pension benefits are protected by ERISA. 29 U.S.C. §§1002(3)(1)(A); 1003(a)(1), (2).

Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984); *McClendon v. Continental Group*, 602 F.Supp. 1492 (D.N.J. 1985).

3. A participant in an employee benefit plan is not required to exhaust grievance or arbitration procedures prior to bringing a statutory claim pursuant to §510 of ERISA, 29 U.S.C. §1140. *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985); *Amaro v. Continental Can Co., supra; Viggiano v. Shenango China Division of Anchor Hocking*, 750 F.2d 276 (3d Cir. 1984).

4. Continental did not violate §510 of ERISA in closing the steel pail line.

5. Continental did not violate §510 of ERISA in capping the Pittsburgh plant and laying off individual and class plaintiffs.

Date: September 24, 1985 /s/ ALAN S. BLOCH
cc: Counsel of record United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-1519

ROBERT GAVALIK, *et al.*,

Plaintiffs,

vs.

CONTINENTAL CAN COMPANY,

Defendant.

Civil Action No. 82-1995

ALBERT J. JAKUB, *et al.*,

Plaintiffs,

vs.

CONTINENTAL CAN COMPANY, a member of Continental Can Group, Inc.,

Defendant.

JUDGMENT ORDER

AND NOW, this 24th Day of September, 1985, upon consideration of the evidence presented by the parties at trial on the issue of liability and in accordance with this Court's Findings of Fact and Conclusions of Law filed herewith,

IT IS HEREBY ORDERED that judgment be, and hereby is, entered in favor of defendant, Continental Can Company, and against the individual and class plaintiffs.

/s/ ALAN S. BLOCH
United States District Judge

cc: Roslyn M. Litman and Thomas Betz, Esquires
1701 Grant Building, Pittsburgh, PA 15219.

James D. Morton and Samuel W. Braver, Esquires
57th Floor, U.S. Steel Building, Pittsburgh, PA 15219.

Paul Titus and Jon Hogue, Esquires
624 Oliver Building, Pittsburgh, PA 15222.

§ 1113. Limitation of actions

(a) [1] No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

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[1] So in original. No subsec. (b) has been enacted.

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respct[1] [sic] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he

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[1] So in original. Probably should be "respect".

exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator (1) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant or beneficiary, or (2) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary

shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, bene-

ficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served

upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order

of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of

section 1132 of this title shall be applicable in the enforcement of this section.

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guar-

anteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(8) Subsection (a) of this section shall not apply to any State law mandating that an employee benefit plan not include any provision which has the effect of limiting or excluding coverage or payment for any health care for an individual who would otherwise be covered or entitled to benefits or services under the terms of the employee benefit plan, because that individual is provided, or is eligible for, benefits or services pursuant to a plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], to the extent such law is necessary for the State to be eligible to receive reimbursement under title XIX of that Act.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law

of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

MASTER AGREEMENT

(including Group Insurance Agreement)

between

CONTINENTAL CAN COMPANY, U.S.A.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

November 1, 1977 to February 15, 1981

ARTICLE 13 GRIEVANCE PROCEDURE

13.1 Purpose

The purpose of this Article is to provide an opportunity for discussion of any request or complaint and to establish a procedure for the processing and settling of grievances, as defined in Section 13.2.

13.2 Definition

A grievance is defined as any difference between the Local Management and the Union or employees as to the interpretation or application of or compliance with this Agreement respecting wages, hours, or conditions of employment. Any dispute over whether a complaint is subject to these procedures shall be handled as a grievance in accordance with the procedures prescribed herein.

13.3 Grievance Committee

The Local Management will recognize a Grievance Committee chosen by the Union from among the employees,

of not more than ten (10) nor less than three (3) members, one of whom shall be the President of the Local Union, unless the Local Union determines otherwise. The size of the Committee presently in effect at each plant location will remain in effect unless changed by mutual agreement. When and if additional bargaining units are added to this Agreement, the number of Grievance Committeemen in such units within the above limits will be determined by mutual agreement.

The purpose of the Committee is to settle with the Local Management any grievance appealed to Step 2.

13.4 Department Stewards

The Local Management will continue to recognize Stewards in those plants where Stewards are presently recognized. In these plants there will be no more than one (1) Steward on each shift in each recognized department.

The Local Union agrees to give the Local Management in writing the names of the persons who will serve as members of the Grievance Committee and of Stewards, if any, and the departments they represent. The Local Union will keep the list up-to-date.

13.5 Time Off for Grievance Work

The Grievance Committee or Shop Stewards will have reasonable time off from their regular work to handle grievances within their own departments. They will not lose any pay for this time off.

Grievance Committee members will also have time off from their regular work to attend Grievance Committee meetings with Management, investigate and prepare grievances, or do anything else the Local Management may ask them to in connection with the settlement of grievances. They will not lose any pay for this time off.

When a Committeeman or Steward has to leave his place of work to handle grievances in his own or another

department, he must get permission from his department Supervisor. When he goes into another department, he must obtain permission of the Supervisor of the department before talking with any employees at their work. This permission shall not be unreasonably withheld.

13.6 Procedure

At all steps in the grievance procedure the grievant and/or the Union representative should disclose to the Company representatives a full and detailed statement of the facts relied upon, the remedy sought, and the provisions of the Agreement relied upon. In the same manner, Company representatives should disclose all the pertinent facts relied upon by the Company. If the Company representative shall consider a grievance at any step to be without merit, he shall clearly state the reasons for denial in the grievance answer.

If any grievance arises, every effort will be made to settle the matter quickly, under the procedure outlined below. The Company agrees it will not lock out the employees and the Union agrees there will be no work stoppage or interference with work.

13.7 Steps in Grievance Procedure
Step 1

(a) Within thirty (30) calendar days after wrong complained of was supposed to have happened or started to exist (but if the employee did not find out about the wrong immediately, he will be allowed thirty (30) calendar days after he reasonably should have found out about it to file the grievance) the employee, with a Grievance Committeeman or Steward, or if he so desires, alone, talks over the grievance with his Supervisor in a sincere effort to settle the problem. This does not preclude the handling of group grievances. The Supervisor must then give his oral answer to the grievance before the end of the second work day after the discussion.

If the Supervisor and the grievance representative, after full discussion, feel the need for aid in arriving at a solution, they may by agreement, invite an additional Company and/or Local Union representative from the plan as may be necessary to participate in further discussion, but such additional participants shall not relieve the Supervisor and grievance representative from responsibility for solving the problem. However, if additional assistance is requested and agreed to such meeting shall be held within three (3) workdays unless the Step 1 representative agrees to an extension of time which will not exceed an additional 3 workdays.

The foregoing procedure, if followed in good faith by both parties, should lead to a fair and speedy solution of most of the complaints arising out of the day-to-day operations of the plant.

(b) If the Supervisor's oral answer is not satisfactory to the employee and the grievance representative determines that the grievance is meritorious, the grievance representative shall put the grievance into writing on forms provided by the Company. The written grievance shall be dated and signed by the grievance representative and employee (or other employees affected). It shall include a statement of the facts relied upon, the Section or Sections of the Agreement believed to have been violated and the corrective action sought.

The written grievance must be presented to the Supervisor for his further consideration before the end of the second workday after he has given his oral answer. The Supervisor shall give his written answer to the grievance representative within 2 workdays after receipt of the written grievance.

(c) Grievances resolved at Step 1 shall be considered resolved without precedent and shall not be used in the discussion of other grievances or arbitration cases.

Step 2

If the written answer at Step 1 is not satisfactory, the Chairman of the Committee shall present the Grievance to the Plant Human Resources Supervisor or other designated Local Management representative within five (5) workdays after receipt of the Supervisor's written answer. The Plant Manager or his designated representative shall meet with the Grievance Committee within ten (10) workdays after the grievance has been appealed to Step 2 to consider the grievance.

At this step the representatives may by agreement invite to participate in the discussion such additional representatives from the plant as may be available for aid. The attendance of such persons will be limited to the time required for their testimony. Such additional participants shall not relieve the grievance representative and the Plant Manager or his designated representative from responsibility for solving the problem. The Plant Manager will give his answer in writing setting forth the reasons for the Company's position within five (5) workdays after the discussions are completed.

Step 3

If the answer to Step 2 is not satisfactory, then within ten (10) working days after the Grievance Committee has received the Plant Manager's answer, the staff representative of the Union will advise the Company's Division Human Resources Office by letter (with a copy to the Plant Manager and Local Union) of his desire to appeal. Discussion of the appealed grievance shall take place at the earliest date of mutual convenience following receipt of the notice of appeal, but not later than 30 days thereafter unless either party shall request in writing, with reasons therefore, that the meeting take place at a later date and the other party agrees. The staff representative of the Union and Grievance Committee will meet with the Company's Division Human Resources Representative and Plant

Manager or his designated representative. The Company's Division Human Resources Representative will give his answer in writing no later than seven (7) working days after the hearing.

Step 4

If the answer to Step 3 is not satisfactory then within 20 calendar days after receiving the written answer of the Company's Division Human Resources Representative, the staff representative of the Union will make an appeal in writing to the Permanent Arbitrator, with a copy to the Company's Division Manager of Human Resources, the Plant Manager, Local Grievance Committee and to the Union's Arbitration Department. Where grievances involve a job classification question, in accordance with Section B3.6(e) the matter will first be referred to Director of Salary Division of United Steelworkers of America and the Company's appropriate Head Office department.

Within 30 calendar days after receipt of the Union's letter appealing the grievance to arbitration, the Permanent Arbitrator shall notify the Step 3 representatives of a date for a hearing after consultation with the designated representatives of the Union's Arbitration Department and the Company's Head Office.

The Arbitrator shall make a decision within 30 calendar days after the arbitration hearing is completed.

A grievance appealed to any step of the procedure set forth herein shall not be further discussed or settled in any prior step except by mutual agreement of the designated representatives in the step to which such grievance has been appealed.

13.8 Observance of Time Limits

By mutual agreement and for good cause, reasonable extensions of time will be given either party in writing at any step in the Grievance Procedure. Any grievance that is not appealed to the next step within the specified time

limits or extension of time limits will be considered settled on the basis of the last decision given. Any grievance that is not answered by the Company within the time limits as specified in Step 1, will be considered as having automatically moved to Step 2 of the Grievance Procedure.

The Company shall not have the right to invoke the time limits under this Agreement to disallow a grievance because of late appeal unless the Union Representative responsible for advancing the case to the next step is first notified of its intention at least three (3) working days (72 hours) prior to the effectiveness of such disallowance.

Any Grievance that is not answered in writing or extended as provided above within the time limits specified at Step 2 and Step 3 of the Grievance Procedure shall be considered settled in favor of the Union with an appropriate remedy. The Union shall not invoke the time limits under this Agreement unless the Company representative responsible for answering the Grievance is notified in writing at least three (3) working days (72 hours) prior to the effectiveness of such forfeiture.

13.9 Minutes and Grievance Record

Local Management shall keep minutes at Step 2 which shall be jointly signed by the Chairman of the Grievance Committee and Plant Manager or his designated representative.

Minutes shall conform to the following outline:

a. Date and place of meeting.

b. Names and positions of those present.

c. Identifying number and descriptions of each grievance discussed.

d. Statement of facts agreed to by the Step 2 representatives.

e. Statement of facts known to be in dispute.

f. Brief statement of Union position.

g. Brief statement of Company position.

Step 2 meeting minutes shall be submitted to the Chairman of the Local Union Grievance Committee within five (5) workdays following the day the meetings close. If the Chairman of the Local Grievance Committee is not in agreement with the minutes, he must within five (5) days indicate his exact exceptions and these, unless cleared up, will be made part of the minutes.

The written grievance, Supervisor's Step 1 written answer, Step 2 minutes and the Plant Manager's Step 2 answer shall comprise the grievance record.

13.10 Regular Arbitration

The parties shall agree upon the selection of a single Arbitrator whose remuneration shall be on a per diem fee basis. In the event of the resignation, incapacity or death of the Arbitrator, the parties shall as promptly as possible mutually designate a successor. Either party may, in its discretion, terminate the services of the Arbitrator and the parties will agree upon the selection of a successor. The parties shall arrange for such associate Arbitrators as may be necessary. If in the opinion of the District Director of the Union and the Division Manager of Human Resources a special situation exists which calls for immediate arbitration and the permanent Arbitrator is not available, they may request the International Union and the Company to designate another Arbitrator to hear and decide such case in accordance with the provisions of this Agreement.

The Arbitrator shall not have jurisdiction to alter or amend in any way the provisions of this Agreement and his decision must be in accordance with the terms of this Agreement. His decision will be binding on the parties.

The Company and the Union will share equally the Arbitrator's fees and expenses, and any clerical or stenographic expense that both agree to.

Post-hearing briefs shall not ordinarily be filed. However, in a given case either or both parties with the consent of the Arbitrator or at his request may submit post-hearing briefs, if he deems such briefs necessary. Such briefs shall not result in an extension of the time limits for the issuance of a decision.

13.11 Expedited Arbitration

Notwithstanding any other provision of this Agreement, the following Expedited Arbitration Procedure is designed to provide prompt and efficient handling of routine grievances.

The Expedited Arbitration Procedure shall be implemented in light of the circumstances existing in each plant, with due regard to the following:

1. Panels of arbitrators shall be designated for each agreed to area by the headquarters representatives of the parties. When such representatives agree that the panel for any area is ready to function, the local parties and appropriate Step 3 Union and Company representatives will be informed so that the procedure may be utilized. A number of arbitrators sufficient to insure the successful operation of this procedure shall be selected. Their expenses and fees shall be borne equally by the Company and the Local Union.

2. This procedure shall be as follows:

   a. Within ten (10) days after receipt of the Step 2 answer the Staff Representative shall determine which grievances shall be referred back to the Step 2 representatives for final disposition. Prior to advising the Local Union Grievance Committee of his/her determination of grievances remanded to Step 2 for disposition, the Staff Representative will so notify the

Company's Step 3 Representative in writing. Should the Step 3 Representative of the Company deem that the issue should not be referred to Expedited Arbitration in accordance with Paragraph 5b, he shall request a review of the issue by the Union's Arbitration Department and the Industrial Relations/Human Resources Department of the company's Head Office. If the parties cannot conclude that the issue is appropriate for Expedited Arbitration, the issue will be returned to Step 3 of the grievance procedure.

If the Staff Representative does not send a grievance back to Step 2, that grievance shall proceed to Step 3 as provided in Section 13.7. Any referral of grievances back to Step 2 by the Staff Representative shall be confirmed in writing to the Company's Step 3 Representative with copies to the Local Union and the local plant management. The Step 3 Representatives may mutually agree to refer back any grievance discussed in a Step 3 grievance meeting.

b. As to any grievance referred back to the Step 2 representatives by the Staff Representative, the chairman of the local union grievance committee may appeal it to the Expedited Arbitration Procedure by notifying the Plant Manager within seven (7) days of receipt of the referral from the Staff Representative. The local plant representatives shall then arrange for handling in Expedited Arbitration as follows:

The list of members of the panel applicable to that plant shall be maintained alphabetically to be used by fixed rotation. The next panel members shall be contacted and requested to serve on the case or cases designated for Expedited Arbitration at a time and place agreed upon by the Step 2 representatives. The date for the hearing shall be within ten (10) days of the appeal unless an extension of time is mutually agreed by the Step 2 representatives.

3. Grievances shall be presented in the Expedited Arbitration Procedure by a previously designated representative of the Local Union and a designated representative of local plant management. Attendance of other persons at the arbitration hearing shall be limited to those who have personal knowledge of the grievance being presented.

4. The hearings shall be conducted in accordance with the following:

a. The hearing shall be informal.

b. No briefs shall be filed or transcripts made.

c. There shall be no formal evidence rules.

d. Arbitration Awards cited by either party will be limited to decisions of the Permanent Arbitrator between the Company and the Union.

e. The arbitrator shall have the obligation of assuring that all necessary facts and considerations are brought before him by the representatives of the parties. In all respects, he shall assure that the hearing is a fair one.

f. If the arbitrator or the parties conclude at the hearing that the issues involved are of such complexity or significance that the case should require further consideration by the parties, the case shall be referred back to Step 3 of the grievance procedure and it shall be processed as though appealed on such date. The arbitrator shall render his written decision within two (2) workdays following the date of the hearing. His decision shall be based on the facts presented by the parties at the hearing, and shall include a brief written explanation of the basis for his conclusion. These awards will not be cited as a precedent in any discussion of any other grievances at any step of the grievance procedure or in subsequent arbitration. The

authority of the arbitrator shall be the same as that provided for in Article 13.10 of the Master Agreement.

5. a. Time limits referred to in this Article exclude Saturdays, Sundays and holidays and may be extended by mutual agreement of the parties involved in each particular phase of the procedure.

b. Grievances subject to this Expedited Arbitration procedure must be confined to issues which do not involve novel problems and which have limited contractual significance or complexity.

c. Decision in Expedited Arbitration shall be consistent with the decisions of the Permanent Arbitration in cases relating to the Company and the Union.

d. Duplicate originals of each decision shall be furnished by the arbitrator to the respective representatives presenting the grievance with copies to:

(1) Local Union Representative

(2) Union Staff Representative

(3) Union's International Office (Arbitration Department)

(4) Plant Manager

(5) Company's Division Manager of Human Resources

(6) CCC-USA—Department of Human Resources

13.12 Retroactivity of Awards and Settlements

Arbitration awards of grievance settlements will not be made retroactive beyond the date of the occurrence or non-occurrence of the event upon which the grievance is based. In no event, however, shall the settlement be earlier than thirty (30) days prior to the date on which the griev-

ance is filed except as provided for in Section 9.10 and Section B3.6 (Description and Classification of New or Changed Jobs) of this Agreement.

13.13 Right to Process Grievance for Legal Heirs

In the event an employee dies, the Union may process on behalf of his legal heirs any claims he would have had relating to any monies due under any provision of this Agreement.

13.14 Pending Grievances

Any grievance which was presented in writing prior to the date of this Agreement and is in process of adjustment under the terms of the Master Agreement previously in effect, will continue to be processed under the terms of the prior Master Agreement and settled in accordance with it for the period prior to the date of this Agreement, and for any subsequent period in accordance with the applicable provisions of this Agreement.

Any grievance which is presented in writing on or after the date of this Agreement which is based on the occurrence or non-occurrence of an event prior to the date of this Agreement shall be processed in accordance with the grievance procedures of this Article 13. Such grievance shall be settled in accordance with the applicable provisions of the prior Master Agreement for the period prior to the date of this Agreement, and for any period thereafter in accordance with the applicable provisions of this Agreement.

13.15 Prior Proposals

The proposals made by each party with respect to changes in the labor agreements and the discussions had

with respect thereto shall not be used, or referred to, in any way during or in connection with the arbitration of any grievance arising under the provisions of such agreements.

This shall not limit in any respect the right of either party to express at the arbitration hearing its position or its intent or interpretation with regard to the meaning of any provisions of the labor agreement.

ARTICLE 23 PENSIONS

The Company agrees to modify the Pension Plan in accordance with the revised Pension Agreement dated November 1, 1977.

YOUR CONTINENTAL PENSION PLAN

ESTABLISHED PURSUANT TO AGREEMENT BETWEEN THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, 5 GATEWAY CENTER, PITTSBURGH, PENNSYLVANIA 15222

AND

THE CONTINENTAL CAN COMPANY, U.S.A.
5745 RIVER ROAD
CHICAGO, ILLINOIS 60631

EFFECTIVE NOVEMBER 1, 1977
EXPIRES FEBRUARY 14, 1981

YOUR CONTINENTAL PENSION PLAN

Part of Your
CONTINENTAL PROGRAM OF PROTECTION
USW MASTER AGREEMENT

SECTION 1

INTRODUCTION

If you are a member of the bargaining unit as defined in the Master Agreement with the Union, you are eligible to

become a member of the Company's pension plan which provides the benefits described in this Booklet (Plan). If so, you may not be a member of any other Company pension or retirement plan.

The Plan's purpose is to provide for the payment of pension and disability benefits upon retirement or termination of employment with the Company. Together with Social Security and income from personal savings, the Plan plays an important part in providing you with needed financial security after you stop working. The Company pays the *full* cost of all Plan benefits and you are not asked to contribute.

The Company Pays The Full Cost

The Plan has been amended to conform to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and any differences between the provisions of the Plan and the present or future requirements of ERISA will be deemed to be resolved in conformance with the requirements of ERISA. Except to the extent preempted by ERISA, it is further intended that the provisions of the Plan conform to the age discrimination requirements under the Age Discrimination in Employment Act of 1978 (ADEA) and the regulations thereunder and applicable state and local law and any differences between the provisions of such requirements shall be deemed to be resolved in conformance with such requirements.

Certain benefits under this pension plan are insured by the Pension Benefit Guaranty Corporation. For additional information, please refer to Section 6 of this Booklet.

SECTION 6

OTHER IMPORTANT FACTS ABOUT THE PLAN

APPEALS PROCEDURE

Any differences that may arise between you and the Company concerning your application for, your entitlement to or the amount of payment of a lump sum retirement allowance, pension or deferred benefit, may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement beginning as step 3 of the Grievance Procedure, except as provided in the Medical Review Procedure described in this Booklet.

If any such grievance is appealed to arbitration in accordance with such provisions, then the arbitrator, insofar as is necessary to the determination of such grievance, has authority only to interpret and apply the provisions of the Pension Agreement. He does not have authority in any way to alter, add to or subtract from any of such provisions, and his decision on any such grievance which is properly referred to him is binding on you, the Company, and the Union. The Company and the Union share equally the costs of the arbitrator's charge and fees, along with any other expenses which they may mutually agree to incur.

REEMPLOYMENT

All payments of any pension or deferred benefit will cease in the event you are reemployed by the Company, beginning with the next monthly payment following your reemployment.

Any option election you made will be suspended during the period of reemployment but will remain as an election on file upon subsequent retirement. You may revoke any option any time before your subsequent retirement subject to the applicable requirements.

Your rights to pre-retirement coverage will be the same as those of any other active employee with same age and service.

When you again leave the Company, the amount of any pension or deferred vested benefit will be based on your previous credited service plus any additional credited service accumulated after reemployment, but not beyond age 72.

IDENTIFICATION NUMBERS OF THE PLAN

The identification number assigned to the Plan by the Internal Revenue Service for tax purposes is EIN 13-0597410. The number assigned to the Plan by the Company in accordance with the Internal Revenue Service instructions is 002.

ADMINISTRATION OF THE PLAN

The Plan is administered by a General Pension Board of at least three persons chosen by the Company's Board of Directors.

The General Pension Board supervises the operation of the Plan—interpreting its provisions, arranging for retirements and authorizing all benefit payments. You can contact the General Pension Board at The Continental Group, Inc., One Harbor Plaza, Stamford, Connecticut 06902 (203) 964-6100.

The Secretary of the Company who is located at the above address has been designated as agent for service of legal process.

INVESTMENT OF FUNDS

The Plan is trusteed. This means that Company contributions go into a trust fund held by a trustee in accordance with the terms of a trust agreement. The trustee is The Northern Trust Company, 50 South LaSalle Street, Chi-

cago, Illinois 60675. The assets of the fund are invested and used to pay benefits to members and their survivors. Plan records to members and their survivors. Plan records are maintained on a calendar-year basis, with the last day of the Plan year falling on December 31.

INSURED BENEFITS

This Plan is a defined benefit plan—which means that benefits are paid out according to a specified formula. Benefits under this Plan are insured by the Pension Benefit Guaranty Corporation (PBGC) if the Plan terminates. Generally, the PBGC guarantees most vested normal age retirement benefits, early retirement benefits, and certain disability and survivor's pensions. However, the PBGC does not guarantee all types of benefits under covered plans, and the amount of benefit protection is subject to certain limitations.

The PBGC guarantees vested benefits at the level in effect on the date of plan termination. However, if benefits have been increased within the five years before plan termination, the whole amount of the plan's vested benefits or the benefit increase may not be guaranteed. In addition, there is a ceiling on the amount of monthly benefit that the PBGC guarantees, which is adjusted periodically.

For more information on the PBGC insurance protection and its limitations, ask the General Pension Board or the PBGC. Inquiries to the PBGC should be addressed to the Office of Communications, PBGC, 2020 K Street, N.W., Washington, D.C. 20006. The PBGC Office of Communications may also be reached by calling (202) 254-4817.

OTHER INFORMATION

As a member of the Continental Pension Plan you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA).

You are entitled to:

— examine, without charge, at your closest Human Resources or Industrial Relations Office, all Plan documents, including The Continental Group, Inc. Basic Non-Contributory Pension Plan and copies of all documents filed with the U.S. Department of Labor, such as the annual report (Form 5500). You will also receive copies of any other reports that ERISA requires.

— obtain copies of all Plan documents and other Plan Information upon written request, at a reasonable charge per page, by writing to:

Secretary, General Pension Board
The Continental Group, Inc.
One Harbor Plaza
Stamford, Connecticut 06902

When writing to the General Pension Board, please include your name, Social Security number, location at which you are employed or where you last worked and the specific Plan document you are requesting.

— once each year, receive a statement of your accrued pension or deferred vested benefit (if any), and the earliest date on which you will become eligible for a deferred vested benefit. This statement may be obtained by writing to the Secretary of the General Pension Board.

In order to calculate your pension estimate, we will need the following information

— Name, Social Security number, location where you are working.

— Sex and date of birth.

— Date hired plus years of regular continuous service with the Company.

— Job class or pay rate.

— W-2 earnings for the last 10 years.

— Spouse's date of birth.

If you do not have this information available, you should contact your Human Resources representative who will make the request for you.

In addition to creating rights for you, ERISA also imposes certain obligations upon those individuals who are responsible for the operation of your Pension Plan. These persons are referred to as "fiduciaries." Fiduciaries are required to act in the best interest of Plan members and exercise prudence in the performance of their duties. Fiduciaries who violate the law may be removed and required to make good any losses they have caused the Plan.

The Company may not fire you or discriminate against you to prevent you from obtaining a pension or deferred vested benefit to which you are entitled under the Plan or keep you from exercising your rights under ERISA.

If your claim for a pension or benefit is denied, you are entitled to receive a written explanation of the reason for the denial. You also have a right to have your claim reviewed as outlined in the Appeals Procedure Section of this Booklet.

If you are improperly denied a pension or deferred vested benefit or, if the material which you have requested is not received within 30 days of your request, you have a right to file suit. In such a case, the court may require the General Pension Board to provide the materials and pay you up to $100 a day until you receive them, unless the materials were not sent to you because of matters beyond the control of the General Pension Board. If Plan fiduciaries are misusing the Plan's money, you also have a right to file suit in a federal court or request assistance from the U.S. Department of Labor.

If you have any questions about this statement or your rights under ERISA, you should contact the Secretary of the General Pension Board or the nearest Area Office of

the U.S. Labor-Management Service Administration, Department of Labor.

UNITED STATES

PENSION AGREEMENT

Details of the Pension Plan referred to in Article 23 of the Master Agreement dated November 1, 1977.

Pension Agreement entered into this 1st day of November, 1977 between Continental Can Company, U.S.A., a member of The Continental Group, Inc. (hereinafter referred to as the "Company") and the United Steelworkers of America, (hereinafter referred to as the "Union") to become effective as of November 1, 1977.

SECTION 2. PENSION PLAN

2.0 The Company agrees to provide, through this amended Pension Plan, the benefits hereinafter specified in this Agreement.

Any differences between the provisions of the Plan and the present or future requirements of the Employee Retirement Income Security Act of 1974 (ERISA) shall be deemed to be resolved in conformance with the requirements of ERISA.

A member of this Plan before January 1, 1976, shall continue to be covered by the Plan on and after such date. After January 1, 1976, an Employee shall become a member on the January 1 following (a) the Employee's last date of hire or, (b) attainment of the age of 24 years, which is later.

After the effective date of this Agreement, no Employee covered by this Agreement shall be a member of any other pension or retirement plan of the Company.

SECTION 7. MISCELLANEOUS

7.0 As or before Employees retire during the term of this Agreement, the Company will or shall have paid into a trust or trusts at least an amount of monies which in the aggregate and on a sound actuarial basis shall be estimated to be sufficient to pay the pensions or deferred benefits which shall have been granted as provided in this Agreement.

7.1 (a) If, during the term of this Agreement, any differences shall arise between the Company and any Employee who shall be an applicant for a lump sum retirement allowance, pension or deferred benefit as provided in this Agreement, as to whether or not such Employee is entitled to or as to the amount of such lump sum retirement allowance, pension or deferred benefit, such differences except as provided in paragraph 3.7 may be taken up as a grievance in accordance with the applicable provisions of the Master Agreement beginning at Step 3 of the Grievance Procedure.

(b) If any such Grievance shall be appealed to arbitration in accordance with such provisions, then the arbitrator, insofar as shall be necessary to the determination of such grievance, shall have authority only to interpret and apply the provisions of this Agreement, but he shall not have authority in any way to alter, add to or subtract from any of such provisions, and his decision on any such grievance which shall properly have been referred to him shall be binding on the Company, the Union, and the Employee concerned therein.

(c) The Company and the Union shall share equally the costs of the arbitrator's charge and fees along with any other expenses which it may be mutually agreed to incur.

7.2 Each application for a benefit under this Agreement shall be in writing on a form provided by the Company. The Company may require any applicant to furnish to it such reasonable, necessary information as the Company may require.

7.3 Assignment, pledge, or encumbrance of any kind, of lump sum retirement allowances, pensions or deferred benefits will not be permitted or recognized under any circumstances, nor shall they be subject to attachment or other legal process for the debts of Pensioners.

7.4 The Company and the Union shall establish a Joint Committee on Pensions consisting of not more than 10 members, half of whom shall be designated by the Company and half of whom shall be designated by the Union. Such Committee shall be furnished annually a report regarding the progress of the operation of the Pension Plan insofar as it affects the Employees. From time to time during the term of this Agreement such Committee shall be furnished such additional information as may be reasonably required for the purpose of enabling it to be properly informed concerning the operation of the Pension Plan insofar as it affects the Employees.

7.5 (a) Neither any pension becoming payable by the Company during the term of this Agreement, nor any survivor benefit becoming payable by the Company during the term of the Group Insurance Agreement, nor any deferred benefit or right thereto pursuant to paragraph 3.6 of this Agreement, shall be discontinued or reduced except as provided in the Agreement or the Group Insurance Agreement, notwithstanding expiration or termination of this Agreement or the Group Insurance Agreement.

(b) Notwithstanding expiration or termination of any prior Pension Agreement or this Agreement, any prior Pension Agreement between the Company

and the Union shall continue in effect to the extent necessary to provide in full the pensions or survivor benefits (or deferred benefits) of Employees or survivors otherwise qualifying under such prior Agreement but not this Agreement, including the payment of any deferred benefits the right to which was established initially during the term of such prior Agreement.

(c) The monthly amount of any pension (not a deferred benefit) otherwise payable under a prior Pension Agreement between the parties hereto to a Pensioner who retired prior to February 15, 1974 shall be increased $15.00 commencing with the month of March 1978.

(d) The monthly amount of any pension (not a deferred benefit), otherwise payable under the immediately preceding Pension Agreement between the parties hereto to a Pensioner retired on or after February 15, 1974 and prior to March 1, 1977, shall be increased commencing with November 1977 to include the supplement payable to the Pensioner under paragraph 9.222 of the immediately preceding Master Agreement between the parties hereto as of October 31, 1977, and, if the increase was less than $15.00, shall be further increased commencing with the month of March 1978 to increase such monthly amount of pension by a total, when combined with the increase for such supplement, of $15.00 per month.

(e) The Monthly amount of any pension (not a deferred benefit) otherwise payable under the immediately preceding Pension Agreement between the parties hereto to a Pensioner who retired on or after March 1, 1977 shall, in lieu of any supplement payable under paragraph 9.222 of the immediately preceding Master Agreement, be increased as of the re-

spective effective dates in accordance with the Basic Pension Amounts and monthly supplements, if applicable, set forth in paragraphs 4.0(c), 4.1 and 4.3 (such increases in the pension to be made prior to reduction for joint and survivor payments under paragraph 4.11, 4.13 or 4.14 or optional form of pension under paragraph 4.12 or a reduced early pension under paragraph 4.2).

(f) The monthly amount of any deferred benefit otherwise payable under the immediately preceding Pension Agreement between the parties hereto to a person who broke regular continuous service on or after March 1, 1977 with entitlement to a deferred benefit shall be increased to reflect the applicable Basic Pension Amounts set forth in paragraph 4.0(c) (such increase in the deferred benefit to be made prior to reduction for joint and survivor payments under paragraph 4.11).

7.6 The Company will advise each Employee at the time of delivery of his first check that the benefit is pursuant to this Agreement between the Company and the Union.

SECTION 8. RIGHTS AND OBLIGATIONS AS TO BARGAINING

8.0 During the term of this Agreement, neither the Union nor any of the Employees shall:

(a) Make any request that this Agreement be changed in any respect or terminated, or that the amount which the Company is required by the provisions of the Pension Plan and of this Agreement to pay or provide for lump sum retirement allowances, pensions or deferred benefits for the Employees, be increased; or

(b) Engage or continue to engage in or in any manner encourage or sanction any strike or other action

which shall interfere with work or production at any of the plants of the Company specified in the Master Agreement for the purpose of securing any such increase or any such change or any other action with respect to lump sum retirement allowances, pensions or deferred benefits.

During the term of this Agreement, the Company shall not have any obligation to negotiate or bargain with the Union with respect to any of the matters covered by clauses (a) and (b) of this paragraph 8.0

During the term of this Agreement, the Company shall not change or request any change in this Agreement or engage in or sanction any lockout for the purpose of securing such change.

1986 APPELLATE CASES INVOLVING ERISA AND EXHAUSTION/ARBITRATION

Alfarone v. Bernie Wolff Const. Corp., 788 F.2d 76 (2nd Cir.), *cert. denied*, 107 S. Ct. 316 (1986)

Anthuis v. Colt Industries Operating Corp., 789 F.2d 207 (3d Cir. 1986)

Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987).

Jones v. Ashland Oil, Inc. 793 F.2d 1292 (Table) (unpublished Disp.) (6th Cir. 1986) (Available on Westlaw, CTA Library)

Moldovan v. Great Atlantic & Pacific Tea Co., Inc., 790 F.2d 894 (3d Cir.), *petition for cert. filed* (Aug. 11, 1986)

Molnar v. Wibberly, 789 F.2d 244 (3d Cir. 1986)

Zipf v. American Tel. & Tel. Co., 799 F.2d 889 (3d Cir. 1986)

1986 DISTRICT COURT CASES INVOLVING ERISA AND EXHAUSTION/ARBITRATION

Allen v. American Home Foods, Inc., 644 F .Supp. 1553 (N.D. Ind. 1986)

Armstrong v. Bert Bell NFL Player Retirement Plan & Trust Agreement, 646 F. Supp. 1094 (D. Colo. 1986)

Baron v. U.S. Steel Corp., 649 F.Supp. 537 (N.D. Indiana 1986)

Bemis v. Hogue, 635 F. Supp. 1100 (E.D. Mich. 1986)

Boesl v. Suburban Trust & Sav. Bank, 642 F. Supp. 1503 (N.D. Ill. 1986)

Borowski v. Vitro Corp., 634 F. Supp. 252 (D.C. Md. 1986)

Bower v. The Bunker Hill Co., ___F.R.D. ___, No. C-82-412RJM & C-85-87RJM (E.D. Wash. Feb. 4, 1986) (Available on Westlaw, DCT Library)

Chicago Painters & Decorators Pension, Health & Welfare & Deferred Savings Plan Trust Funds v. Harris, No. 85-C-9555 (N.D. Ill. June 18, 1986) (Available on Westlaw, DCT Library)

Covington v. Int'l Rehabilitation Associates, Inc., No. 86-3503 (E.D. Pa. Oct. 16, 1986) (Available on Westlaw, DCT Library)

Dameron v. Sinai Hosp. of Baltimore, Inc., 626 F. Supp. 1012 (D. Md. 1986)

Donohue v. Custom Management Corp., 634 F. Supp. 1190 (W.D. Pa. 1986)

Grumbine v. Teamsters Pension Trust Fund of Phila. & Vicinity, 638 F. Supp. 1284 (E.D. Pa. 1986)

I.A.M. Nat. Pension Fund Ben. v. Towner Mfg., No. 85-0777 (D.D.C. March 14, 1986)

International Union v. Allis Chalmers Corp., 643 F. Supp. 342 (E. D. Wis. 1986)

Kayes v. Ray B. Bracy Const., Inc., No. 85-780 (E.D. Pa. April 14, 1986) (Available on Westlaw, DCT Library)

Manitowoc Engineering Corporation Salaried Employees' Deferred Profit-Sharing Plan v. Powalisz, No. 85-C-534 (E.D. Wis. Feb. 12, 1986) (Available on Westlaw, DCT Library)

Manser v. Missouri Farmers Ass'n, Inc., 652 F. Supp. 267 (W.D. Mo. 1986)

McClendon v. Continental Group, Inc., 648 F. Supp. 1115 (D.N.J. 1986)

O'Grady v. Firestone Tire & Rubber Co., 635 F. Supp. 81 (S.D. Ohio 1986)

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Quattrochi v. Allied Chemical Corp., 633 F.Supp. 838 (E.D. Pa. 1986)

Smith v. ABS Industries, Inc., 653 F. Supp. 94, (N.D. Ohio 1986)

Southern Elec. Retirement Fund v. George Arp Elec. Corp., 635 F. Supp 139 (E.D. Tenn. 1986)

Spellman v. Aetna, No. 84-C-5735 (N.D. Ill. Sept. 10, 1986) (Available on Westlaw, DCT Library)

Sulit v. Dean Witter Reynolds, Inc., 54 U.S.L.W. 2584 (W.D. Mo. March 27, 1986)

Tiger v. AT&T Technologies Plan For Employees' Pensions, Disability Benefits, 633 F. Supp. 532 (E.D.N.Y. 1986)

Tyson v. Teamsters, No. 85-C-7551 (E.D. Ill. May 1, 1986) (Available on Westlaw, DCT Library), *rev'd*, 811 F.2d 1145 (7th Cir. 1987).

United Elec., Radio & Mach. Workers of America v. Amcast Indus Corp., 634 F. Supp. 1135 (S.D. Ohio 1986)

Weeks v. FMC Corp., No. CIV-86-212E (W.D.N.Y. 1986) (Available on Westlaw, DCT Library)

Weir v. Litton Bionetics, 41 F.E.P. Cases 1150 (D. Md. May 2, 1986)

Western Conference of Teamsters Pension Trust Fund v. Jones, 646 F. Supp. 228 (N.D. Cal. 1986)